

No. 12722

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United States  
Court of Appeals  
for the Ninth Circuit.

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CALIFORNIA MOTOR TRANSPORT CO., LTD.,  
a Corporation, et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK, a Corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

FILED

MAY - 6 1951

PAUL P. O'BRIEN



No. 12722

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,  
a Corporation; CALIFORNIA MOTOR EXPRESS, LTD., a Corporation; VALLEY AND COAST TRANSIT COMPANY, a Corporation; COAST LINE EXPRESS, a Corporation; SUNSET TRANSFER COMPANY, a Corporation; RED LINE TRANSFER COMPANY, a Co-partnership; JAMES C. COUGHLIN, WILLIAM COUGHLIN, JOSEPH COUGHLIN, WARREN COUGHLIN and ROSE MARTIN, Co-partners, d.b.a. RED LINE TRANSFER COMPANY; JAMES COUGHLIN, d.b.a RED LINE TRANSFER COMPANY; BLACK COMPANY, a Corporation; WHITE COMPANY, a Co-partnership; FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

## COMPLAINT

(Insurance Premiums)

Plaintiff complains of defendants and each of them:

I.

At all times herein mentioned, plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to transact and transacting a general casualty insurance business in California.

II.

At all times herein mentioned defendants California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were corporations, and each of them was a corporation, organized and existing under and by virtue of the laws of California and engaged in the business of a highway carrier in California.

III.

At all times herein mentioned defendants James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin were citizens and residents of California and co-partners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

IV.

At all times herein mentioned defendant James C. Coughlin, a citizen and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in San Francisco, California.

## V.

The names of defendants Black Company, a corporation, White Company, a co-partnership, First Doe, Second Doe and Third Doe are fictitious names, and plaintiff prays that at such times as the true names of such defendants so named are ascertained, plaintiff will have leave of court to amend this complaint to insert the true names of said defendants.

## VI.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## VII.

On or about September 1, 1946, at the request of defendants, and each of them, in San Francisco, California, plaintiff made, executed and issued to defendants its written contract of primary casualty insurance known as "Comprehensive General—Automobile," policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants, and each of them, for one year against bodily injuries, with limits of liability of \$10,000 each person and \$20,000 each accident, and property damage, with limits of liability of \$5,000 each accident, as arising out of the ownership, maintenance and use of certain automobiles and trucks by defendants, and each of them, in their business, at the premium rate of \$2.00 per \$100.00 of gross



earnings of each of said defendants during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

### VIII.

Thereafter plaintiff delivered said policy to Harry R. Cantlen, the agent of defendants and each of them, following which defendants reported claims and lawsuits under said policy to plaintiff and, pursuant to voluntary audit each month of the defendants, defendants remitted monthly premium payments to plaintiff, said payments being subject to final audit by plaintiff at said rate at the end of said policy period as aforesaid.

### IX.

On or about December 19, 1946, plaintiff, pursuant to the terms of said policy, caused a written notice of cancellation of said policy to be mailed to defendants, and each of them, at the address shown on said policy, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947.

Pursuant to law and on or about said December 20, 1946, plaintiff notified said Railroad Commission of said notice of cancellation to defendants and each of them. On January 21, 1947, said policy was cancelled in accordance with said notices and each of them.

## X.

Prior to said cancellation, and in accordance with said voluntary monthly audits made by defendants, and each of them, defendants paid to plaintiff the total sum of \$9,131.13.

Subsequent to said cancellation and as soon as possible thereafter, plaintiff caused the total earned premium of said policy for the period from September 1, 1946, to January 21, 1947, to be computed by final audit at said rate of \$2.00 per \$100 of gross earnings of defendants, said premium so computed being in the sum of \$15,081.64, leaving an unpaid balance of said total earned premium in the sum of \$5,950.51 due plaintiff from defendants.

## XI.

On October 27, 1947, plaintiff made demand on defendants for said unpaid balance and no part of said unpaid balance of said total earned premiums due plaintiff has been paid by defendants, there being now due, owing and unpaid to plaintiff from defendants the sum of \$5,950.51, together with interest at the rate of 7% per annum from October 27, 1947.

For a second, separate and distinct cause of action, plaintiff complains of defendants, and each of them:

## I.

Plaintiff refers to Paragraphs I to VI, inclusive, of the first cause of action and by this reference incorporates said paragraphs and each and all of

the allegations thereof in this, the second cause of action, with like force and effect as though the same were fully set forth herein.

## II.

On or about September 1, 1946, at the request of defendants, and each of them, at San Francisco, California, plaintiff made, executed and issued to defendants its written contract of casualty insurance known as "Comprehensive General—Automobile," policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in "Comprehensive General—Automobile," policy No. SPL 20968 issued by plaintiffs to defendants, and each of them, as alleged in Paragraph VII in the first cause of action.

By said policy of excess insurance plaintiff insured defendants, and each of them, for one year against bodily injury, with limits of liability of \$100,000 each person and \$300,000 each accident, and property damage, with limits of liability of \$5,000 each accident, as arising out of the ownership, maintenance and use of said automobiles and trucks by defendants, and each of them, in their business, all in excess of said primary coverage and at the premium rate of \$.20 per \$100 of gross earnings of each said defendants during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

## III.

Thereafter plaintiff delivered said policy to Harry R. Cantlen, the agent of defendants, and each of them, following which defendants reported claims and lawsuits under said policy to plaintiff.

## IV.

On or about December 19, 1946, plaintiff, pursuant to the terms of said policy, caused a written notice of cancellation of said policy to be mailed to defendants, and each of them, at the address shown on said policy, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947, at which time said policy was cancelled in accordance with said notices and each of them.

## V.

Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premium of said policy for the period of September 1, 1946, to January 21, 1947, to be computed by final audit at said rate of \$.20 per \$100.00 of gross earnings of defendants, said premiums so computed being the sum of \$1,891.48 due plaintiff from defendants.

## VI.

On October 27, 1947, plaintiff made demand on defendants for said unpaid premiums, and no part of said unpaid premiums due plaintiff has been paid by defendants, there being now due, owing

and unpaid to plaintiff from defendants the sum of \$1,891.48, together with interest at the rate of 7% per annum from October 27, 1947.

Wherefore, plaintiff prays that judgment be entered against defendants in the sum of \$7,841.99, together with interest at the rate of 7% per annum from October 27, 1947, until paid, and costs and such other and further relief as is meet and proper in the premises.

/s/ DAN HADSELL,

/s/ JOE G. SWEET,

/s/ EVERETT A. INGALLS,  
HADSELL, SWEET &  
INGALLS,

/s/ SYDNEY P. MURMAN,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 5, 1948.

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[Title of District Court and Cause.]

ORDER GRANTING MOTION TO BRING IN  
THIRD PARTY DEFENDANT

Motion having been made to defendants, ex parte and before the service of their answer, before the above entitled Court, on the 18th day of June, 1948, and good cause appearing therefore,

It Is Hereby Ordered that said motion be, and the same is hereby granted and leave is hereby granted to serve upon Bayly. Martin & Fay, Inc.,

a corporation, summons and third party complaint, copies of which are annexed to the within Order.

Done in open Court this 18th day of June, 1948.

/h/ DAL M. LEMMON,

Judge of the United States  
District Court.

[Endorsed]: Filed June 18, 1948.

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In the United States District Court for the North-  
ern District of California, Southern Division

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,  
a Corporation, et al.,

Defendants and Third Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,  
Third Party Defendant.

[Title of District Court and Cause.]

### THIRD PARTY COMPLAINT

Defendants above named, as Third Party Plaintiffs complain of Bayly, Martin & Fay, Inc., a cor-



poration, Third Party Defendant and for cause of action allege as follows:

I.

That at all times herein mentioned The Fidelity and Casualty Company of New York, was and is a corporation and existing under and by virtue of the laws of New York and licensed to transact and transacting a general casualty insurance business in California.

II.

At all times herein mentioned defendants and third party plaintiffs, California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were and are corporations, and each of them was and is a corporation, organized and existing under and by virtue of the laws of California and engaged in the business of a highway carrier in California.

III.

At all times herein mentioned defendants and third party plaintiffs, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Morton were and are citizens and residents of California and co-partners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

## IV.

At all times herein mentioned defendant and third party plaintiff, James C. Coughlin, a citizen and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in Los Angeles, California.

## V.

At all times herein mentioned third party defendant, Bayly, Martin & Fay, Inc., was and is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having license to act and acting in said state as an insurance broker.

## VI.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## VII.

That at all times herein mentioned third party defendant Bayly, Martin & Fay, Inc., was the duly appointed and acting and was acting as agent and broker for the placing and maintenance of casualty insurance for and on behalf of third party plaintiffs.

## VIII.

That there was in existence and in effect between third party plaintiffs and The Fidelity and Casualty Company of New York a certain written contract and policy of casualty insurance numbered SPL



1457 between the approximate dates September 1, 1945, to September 1, 1946; that said policy was obtained by third party defendant as agent for third party plaintiffs; that said policy of insurance provided for the payment by third party plaintiffs to said The Fidelity and Casualty Company of New York of a premium rate of 1.223% of and upon the gross earnings of third party plaintiffs; that third party plaintiffs regularly reported their gross earnings and remitted payment of said premiums to third party defendant, and the third party defendant acted and assumed to act as the agent of third party plaintiffs in all matters pertaining to said insurance; that prior to the expiration of the said policy and prior to the 1st day of September, 1946, the third party defendant took up with third party plaintiffs the matter of issuance by The Fidelity and Casualty Company of New York to third party plaintiffs of a new type of policy designated as a retrospective plan of insurance in place and stead of their existing insurance.

That prior to the 1st day of September, 1946, and on or about the 27th day of August, 1946, third party defendant delivered and forwarded to third party plaintiffs a certain contract of binder; that in connection therewith third party defendant represented to third party plaintiffs that, pending the negotiations upon the new plan of insurance above mentioned, the third party plaintiffs would continue to be covered by insurance provided by The Fidelity and Casualty Company of New York under and by

virtue of the aforementioned binder contract upon the same terms as were provided for in the aforementioned policy, SPL 1457, and particularly at the same premium rate of 1.223% of the gross earnings of third party plaintiffs; that said representations were made to third party plaintiffs by third party defendant with the intent to induce third party plaintiffs to rely thereon and to induce them to continue forwarding to the Fidelity and Casualty Company of New York via third party defendant premiums based upon the premium rate 1.223% of third party plaintiffs' gross earnings.

## IX.

That third party plaintiffs did in fact rely upon the representations so made by third party defendant and did, during the aforementioned negotiations continue to forward monthly to The Fidelity and Casualty Company of New York via third party defendant its gross earnings' reports, estimated premiums, and premium payments all of the foregoing based upon the premium rate of 1.223% of third party plaintiffs' gross earnings; that the representations made by the third party defendant to third party plaintiffs were false and untrue; that third party defendant knew at the time it made such representations that such representations were in fact false and untrue; that on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insur-

ance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs.

### X.

That said The Fidelity and Casualty Company of New York now claims from third party plaintiffs the sum of \$7,841.99 together with interest at the rate of 7% from and after October 27, 1947, as premiums due under said policies SPL 20950 and 20968; that said claim is the basis of the action herein filed and entitled The Fidelity and Casualty Company of New York, Plaintiff, vs. California Motor Transport Company, Ltd., a corporation, et al., defendants, No. 28049-H; that any liability of third party plaintiffs under this claim is the result of and was caused by the misrepresentations of third party defendant as aforesaid.

As for a second, separate and distinct cause of action third party plaintiffs allege:

### I.

That third party plaintiffs incorporate herein by reference and make a part hereof as though fully

set forth herein paragraphs I to VIII, inclusive, and paragraph X of the first cause of action in this third party complaint.

## II.

That the representation and suggestions so made by third party defendant to third party plaintiffs were false and untrue; that third party defendant in making such representations and suggestions had no reasonable ground for believing them to be true; that on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs; that third party plaintiffs relied upon the representations and suggestions so made by third party defendant and continued to forward to third party defendant premiums based upon the premium rate of 1.223% of their gross earnings.

As and for a third, separate and distinct cause of action third party plaintiffs allege:

## I.

Third party plaintiffs refer to paragraphs I to VIII, inclusive, and paragraph X, of the first cause of action in this third party complaint and incorporate said paragraphs by reference as though fully set forth herein, except that third party plaintiffs do not incorporate by reference and do not make a part herein the allegations contained in paragraph VIII of said first cause of action commencing with the word "that" on line 9, page 4, of this third party complaint and extending to and including the word "earnings" on line 14, page 4, of this third party complaint.

## II.

That on or about the 1st day of September, 1948, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs; that it was the duty of said third party defendant as agent and broker of third party plaintiffs to notify third party plaintiffs of



the receipt and acceptance by third party defendant of the said policies SPL 20950 and 20968, to disclose to third party plaintiffs as the principals of third party plaintiffs the fact of such receipt and acceptance and particularly to notify said third party plaintiffs that said policies contained provisions for increased premium rates as specified hereinbefore and to disclose said material fact to third party plaintiffs as the principals of third party defendant; that third party defendant concealed from and failed to notify third party plaintiffs of the receipt of said policies and of the increased premium rate contained therein and failed to disclose said facts to third party plaintiffs with intent to induce third party plaintiffs to believe that they continued to be protected and covered by insurance provided by the Fidelity and Casualty Company of New York by the same premiums as were provided for in the policy above mentioned SPL 1457 and particularly at the premium rate 1.223% of the gross earnings of third party plaintiffs and with intent to induce them to continue to forward to The Fidelity and Casualty Company of New York insurance premiums based upon the rate of 1.223% of third party plaintiffs gross earnings; that as the result of the failure of third party defendant to disclose said facts and to notify said third party plaintiffs of said facts, third party plaintiffs have become liable to the said The Fidelity and Casualty Company of New York in the sum of \$7,841.99 together with interest at the rate of 7% from and after October 27, 1947, as premiums due under said poli-

cies SPL 20950 and 20968 according to the allegations in plaintiff's complaint.

As and for a fourth, separate and distinct cause of action third party plaintiffs allege as follows:

I.

Third party plaintiffs refer to paragraphs I to VIII, inclusive, of the first cause of action in this third party complaint and incorporate the same by reference as though fully set forth herein, except that third party plaintiffs do not incorporate herein by reference the allegations in paragraph VIII of said first cause of action commencing with the word "that" on line 1 of page 4 and extending to and including the word "earnings" on line 14 of said page 4 of this third party complaint.

II.

That on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant

was acting as the agent and broker of third party plaintiffs; that third party defendant carelessly and negligently failed, neglected and omitted to notify third party plaintiffs of its receipt or its acceptance of policies SPL 20950 and 20968, and retained same in its possession until August 7, 1947.

### III.

That The Fidelity and Casualty Company of New York has asserted a claim against third party plaintiffs in the sum of \$7,841.99 for premiums under said policies; that said claim is the basis of plaintiff's complaint herein; that any liability of third party plaintiffs to said The Fidelity and Casualty Company of New York has been and is the proximate result of the negligence and carelessness of said third party defendant.

Wherefore third party plaintiffs pray that if it be adjudged that third party plaintiffs are liable to the said The Fidelity and Casualty Company of New York in said sum of \$7,841.99 together with interest, as aforesaid or in any other sum, that third party plaintiffs be awarded judgment herein against third party defendant in the same sum, together with their costs of suit and such other relief as the Court may deem proper.

/s/ NORMAN A. EISNER,

/s/ SAMUEL W. WICKLOW,

Attorneys for defendants and  
third party plaintiffs.

[Endorsed]: Filed June 18, 1948.



[Title of District Court and Cause.]

## ANSWER

Now come defendants California Motor Transport Co., Ltd., a corporation, California Motor Express, Ltd., a corporation, Valley and Coast Transit Company, a corporation, Coast Line Express, a corporation, Sunset Transfer Company, a corporation, Red Line Transfer Company, a co-partnership, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin, co-partners d. b. a. Red Line Transfer Company, James Coughlin d. b. a. Red Line Transfer Company, and answering plaintiff's complaint on file herein admit, deny and allege as follows:

### I.

Answering paragraph IV of the first cause of action of plaintiff's complaint defendants deny generally and specifically, each and all of the allegations therein contained.

### II.

Answering paragraph VII of the first cause of action of plaintiff's complaint defendants deny generally and specifically, all and singular the allegations therein contained.

### III.

Answering paragraph VIII of the first cause of action of plaintiff's complaint the defendants aver that they have no information or belief upon the

subject sufficient to enable them to answer the allegation that plaintiff delivered the policy referred to to Harry R. Cantlen and basing their denial upon that ground, defendants deny generally and specifically said allegation; defendants deny generally and specifically all other allegations in said paragraph VIII.

#### IV.

Answering the allegations in paragraph IX of the first cause of action of plaintiff's complaint defendants aver that they have no information or belief sufficient to enable them to answer the allegations contained in said paragraph commencing with the word "pursuant" on line 8 page 4 to and including the word "them" on line 10 page 4, and basing their denial on that ground defendants deny generally and specifically, all and singular the allegations contained therein.

Defendants deny generally and specifically the allegation commencing with the word "on" in line 10 page 4 of plaintiff's complaint, extending to and including the word "them" on line 12 of page 4.

#### V.

Answering paragraph X of plaintiff's first cause of action defendants admit the payment of \$9,131.13 to plaintiff, but in this connection defendants allege that said payment was not made under or pursuant to the policies referred to in said complaint.

Defendants aver that they have no information or belief sufficient to enable them to answer the allegations commencing with the word "subsequent" on

line 17 of page 4 of plaintiff's complaint, and extending to and including the figure "\$15,081.64," on line 22 of said page 4, and basing their denial on that ground defendants deny generally and specifically, all and singular the allegations contained therein.

Defendants deny generally and specifically the averments or words in said paragraph X commencing with the word "leaving" on line 22 of page 4 to and including the word "defendants" on lines 23 and 24 of said page 4.

## VI.

Except that defendants admit a demand by plaintiff for payment of \$5,950.51 and a refusal by defendants to pay plaintiffs the said sum, defendants deny generally and specifically, each and all of the allegations contained in paragraph XI of plaintiff's first cause of action, and in this connection defendants deny that there is a balance due, owing and unpaid to plaintiff from defendants in the sum of \$5,950.51, together with interest as alleged, or any lesser sum, or any sum at all.

As a further separate, and affirmative defense to plaintiff's first cause of action defendants allege as follows:

## I.

That there was in existence and in effect between the parties plaintiff and defendants a written contract and policy of casualty insurance numbered SPL 1457, between the approximate dates of September 1, 1945, and September 1, 1946; that said

policy of insurance provided for the payment by defendants to plaintiff of a premium rate of 1.223% upon the gross earnings of defendants; that pursuant to said policy, and monthly, and as soon as the gross earnings for each month were ascertained, defendants remitted to plaintiff a report of the gross earnings for each month together with an estimate of the premium based upon the foregoing premium rate 1.223%.

## II.

That prior to the apparent expiration date of said policy, to wit, on or about September 1, 1946, defendants received from their agent a binder contract and were informed that the provisions in policy SPL 1457 with particular respect to the aforementioned premium rate would continue in effect pending negotiations between defendants' agent and plaintiff as to the renewal of said policy and as to the adoption by defendants of a retrospective plan of insurance.

## III.

That between the period of September 1, 1946, and January 21, 1947, defendants continued to forward to plaintiff their reports of gross earnings and estimated premiums based upon the aforementioned premium rate of 1.223% of gross earnings;

That said reports and checks for premiums filed therewith clearly indicated thereon that the estimated premiums were based upon the aforementioned premium rate; that plaintiff accepted such

reports and the checks in payment of premiums and entirely failed and neglected to advise defendants that it considered or contended that any new policy or premium rate was in effect during such period of September 1, 1946, to January 21, 1947; that defendants continued to remit the said reports and premiums in reliance upon the said acceptance of said premium checks by plaintiff as well as upon the information of their agent as aforesaid; that defendants at no time consented or agreed to any alteration of premium rates; that the first knowledge had by defendants of any claim by plaintiff for increased premiums was had in the month of August, 1947; that had defendants been advised by plaintiff at any time during the period of September 1, 1946, to January 21, 1947, that the premium rate used by defendants in estimating the premiums due to plaintiff was deemed and considered by plaintiff to be incorrect and inadequate under the terms of the policies SPL 20950 and 20968 said defendants would have immediately denied their liability for such premiums or any liability under said last mentioned policies; that the action of plaintiff in accepting the reports and premiums forwarded by defendants, clearly indicating, as aforesaid, the estimation of said premiums on the basis of the premium rates provided for in policy SPL 1457, led and induced defendants to believe that they continued to be protected under the terms of said policy SPL 1457 and to be liable for premiums at the rate provided for in said policy SPL 1457 during the



period of the negotiations alleged in paragraph II above; that the action of plaintiff has estopped plaintiff from asserting at this time that any new premium rate or any premium rate other than that provided in policy No. SPL 1457 was in effect and binding upon defendants during the period September 1, 1946 to January 21, 1947.

Answering the Second Cause of Action in Plaintiff's Complaint These Answering Defendants Admit, Deny and Allege as Follows:

I.

Answering paragraph IV of the first cause of action of plaintiff's complaint, so far as said paragraph is incorporated by reference into and made a part of paragraph I of plaintiff's second cause of action, these answering defendants deny generally and specifically, each and all of the allegations therein contained, except that defendants aver that defendant James C. Coughlin was and is doing business under the name of Red Line Transfer Company, in Los Angeles, California.

II.

Answering paragraph II of the second cause of action in plaintiff's complaint these defendants deny generally and specifically, all and singular the allegations therein contained.

III.

Answering the allegation contained in paragraph

III of plaintiff's second cause of action commencing with the word "thereafter" on line 3 page 6 of plaintiff's complaint and extending to and including the word "Cantlen" on line 4, page 6 of plaintiff's complaint, defendants aver that they have no information or belief upon the subject sufficient to enable them to answer the said allegation and basing their denial upon that ground defendants deny generally and specifically the said allegation; defendants deny generally and specifically, each and all of the other allegations in said paragraph.

#### IV.

Defendants deny generally and specifically the allegation commencing with the word "at" on line 13 page 6 of plaintiff's complaint to and including the word "them" on line 14 page 6 of plaintiff's complaint.

#### V.

Defendants aver that they have no information or belief sufficient to enable them to answer the allegations in paragraph V of plaintiff's second cause of action commencing with the word "subsequent" line 16 page 6 of plaintiff's complaint to and including the figure "\$1,891.48" on line 21 page 6 of plaintiff's complaint and basing their denial on that ground deny generally and specifically, all and singular, the allegations therein contained; defendants deny generally and specifically the words contained in said paragraph V commencing with the word "due" on line 21 page 6 and extending to and in-

cluding the word "defendants" on line 21 page 6 of plaintiff's complaint.

## VI.

Except that defendants admit a demand upon them for the payment of \$1,891.48 and a refusal by them to pay to plaintiff the said sum defendants deny generally and specifically, each and all of the allegations contained in paragraph VI of the second cause of action of plaintiff's complaint.

As and for a Further Separate and Affirmative Defense to Plaintiff's Second Cause of Action Defendants Allege as Follows:

## I.

These answering defendants refer to paragraph I, II and III of their separate and affirmative defense to plaintiff's first cause of action and incorporate the same by reference herein as though fully set forth herein.

Wherefore, defendants pray that they have judgment; that plaintiff take nothing by its complaint and that defendants be hence dismissed with their costs of Court.

/s/ NORMAN A. EISNER,

/s/ SAMUEL W. WICKLOW,

Attorneys for Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 22, 1948.



[Title of District Court and Cause.]

ANSWER OF THIRD PARTY DEFENDANT

Comes now Bayly, Martin & Fay, Inc. of California, a corporation, and appearing herein as Third Party Defendant, and answering (1) the Third Party Complaint herein and (2) the original Complaint herein, denies, admits, and alleges as follows:

Answer to First Cause of Action of  
Third Party Complaint

I.

Admits the allegations of Section I of the First Cause of Action of the Third Party Complaint herein.

II.

Admits the allegations of Section II of the First Cause of Action of the Third Party Complaint herein.

III.

Admits the allegations of Section III of the First Cause of Action of the Third Party Complaint herein.

IV.

Admits the allegations of Section IV of the First Cause of Action of the Third Party Complaint herein.

V.

Admits the allegation of Section V of the First Cause of Action of the Third Party Complaint herein, but in this connection this answering Third

Party Defendant, Bayly, Martin & Fay, Inc., of California, appears under its true name, the last mentioned one, in place and instead of the name set forth in said Third Party Complaint, to wit, Bayly, Martin & Fay, Inc.

#### VI.

Admits the allegations of Section VI of the First Cause of Action of the Third Party Complaint herein.

#### VII.

Admits the allegations of Section VII of the first Cause of Action of the Third Party Complaint, and in this connection Third Party Defendant alleges that "casualty insurance," as herein used, includes Comprehensive, Public Liability, and Property Damage Insurance for and on behalf of Third Party Plaintiffs.

#### VIII.

Answering Section VIII of the First Cause of Action of the Third Party Complaint, Third Party Defendant admits that there was in existence and in effect between Third Party Plaintiffs and the Fidelity and Casualty Company of New York (sometimes hereinafter referred to as "Fidelity") a certain written contract and policy of casualty insurance numbered SPL-1457 between the approximate dates of September 1, 1945, to September 1, 1946, but in this connection Third Party Defendant alleges that said policy was a Comprehensive Special Public Liability Policy including Comprehensive, Public Liability and Automobile Property Damage Insurance; admits that said policy was obtained by Third

Party Defendant as agent for Third Party Plaintiff; admits that said policy of insurance provided for the payment by Third Party Plaintiff's to Fidelity of a premium rate of 1.223% of and upon the gross earnings of said Third Party Plaintiffs; admits that Third Party Plaintiffs regularly reported their gross earnings and remitted payment of said premium to Third Party Defendant, and in this connection alleges that Third Party Defendant received said premiums in its fiduciary capacity, as provided by law, and that Third Party Defendant, acting in such fiduciary capacity and in no other capacity, remitted said premiums to Fidelity; admits that the Third Party Defendant acted and assumed to act as the agent of Third Party Plaintiffs in all matters pertaining to said insurance; denies that prior to the expiration of the said policy and prior to the 1st day of September, 1946, or at any time, the Third Party Defendant took up with Third Party Plaintiffs the matter of issuance by the Fidelity of a new type of policy designated as a Retrospective Plan of Insurance, in place and instead of their existing insurance and in this connection alleges that Third Party Defendant had for many years, to wit, from 1941 to the date of the matter set forth in the Third Party Complaint, acted as broker and agent for Third Party Plaintiffs in procuring and placing for Third Party Plaintiffs the necessary insurance of the type provided for in said policy No. SPL-1457; alleges that a policy of insurance substantially the same as said policy No. SPL-1457 was so pro-

cured for Third Party Plaintiffs covering the periods from September 1, 1941 to September 1, 1942, from September 1, 1942 to September 1, 1943, from September 1, 1943 to September 1, 1944, from September 1, 1944 to September 1, 1945, from September 1, 1945 to September 1, 1946, and from September 1, 1946 until said policy was cancelled; alleges that as each and every one of said last mentioned policies neared its termination date, Third Party Defendant, acting for and on behalf of Third Party Plaintiffs, and at their instructions, entered into negotiations with the insurance carrier, to wit, the Fidelity and Casualty Company of New York, concerning the premium to be paid by Third Party Plaintiffs for the next ensuing year, but that in each and every year as aforesaid the type of insurance and the provisions of the insurance policies, other than the premium, were substantially the same as the provisions of said policy No. SPL-1457, but that in each case and for each year the amount of the premium was negotiated anew by Third Party Defendant for and on behalf of Third Party Plaintiffs; alleges that prior to September 1, 1946 and prior to the termination of the policy in force from September 1, 1945 to September 1, 1946, Third Party Defendant entered into negotiations for and on behalf of Third Party Plaintiffs concerning the premium to be paid by Third Party Plaintiffs for the next ensuing year, to wit, from September 1, 1946 to September 1, 1947; alleges that said Fidelity made the following proposals to Third Party Defendant, which said proposals said Third Party

Defendants duly and timely reported to Third Party Plaintiffs, to wit, that the same type of policy would be issued as had been issued in previous years, that the rate should be 2.20% of and upon the gross earnings of Third Party Plaintiffs, and that in addition thereto Third Party Plaintiffs should sign a collateral agreement with the insurance company, entitled a Retrospective Agreement, which said Retrospective Agreement provides in substance that the aforesaid premium should be modified to require payment of more or less than 2.20% at the end of the year of insurance in accordance with the loss experience of Third Party Plaintiffs, which said Retrospective Agreement was duly delivered by Third Party Defendant to Third Party Plaintiffs and is now either in the possession of Third Party Plaintiffs or in the possession of plaintiff Fidelity and Casualty Company of New York; denies that prior to the 1st day of September, 1946, and on or about the 27th day of August, 1946, or at any time, Third Party Defendant delivered and forwarded to Third Party Plaintiffs a certain Contract of Binder, and in this connection Third Party Defendant alleges that on or about August 27, 1946, the said Fidelity, at the request of Third Party Plaintiffs and Third Party Defendant, duly issued its Contract of Binder, effective for a sixty day period from September 1, 1946, and delivered the same to Third Party Defendant as agent of Third Party Plaintiffs, and thereupon Third Party Defendant delivered the same to its principals, the Third Party Plaintiffs, and said binder is now in the possession of Third



Party Plaintiffs and its contents known thereto; denies that in connection therewith, or in any connection, Third Party Defendant represented to Third Party Plaintiffs, or to any one, pending the negotiations upon the new plan of insurance above mentioned, or pending any negotiations, or at all, that the Third Party Plaintiffs would continue to be covered by insurance provided by the Fidelity under and by virtue of the aforementioned binder contract upon the same terms as were provided for in the aforementioned policy No. SPL-1457, and particularly at the same premium rate of 1.223% of the gross earnings of Third Party Plaintiffs, and in this connection Third Party Defendant alleges that at all times herein mentioned Third Party Plaintiffs knew that it was necessary for Third Party Defendant to negotiate and that Third Party Defendant was negotiating for a premium rate for the ensuing year and further knew that the proposal made by Fidelity, as aforesaid, was for a higher premium rate than for the preceding year, as aforesaid, and further knew that the sole and only reason that the policy had not been duly issued for the ensuing year, to wit, September 1, 1946 to September 1, 1947, was the proposal and demand of the Fidelity for a higher rate and for the signing of the said Retrospective Agreement by Third Party Plaintiffs; denies that said representations or any representations were made to Third Party Plaintiffs, or anyone, by Third Party Defendant with the intent to induce Third Party Plaintiffs to rely thereon, or with any intent to induce them to continue forwarding to Fidelity



via Third Party Defendant, or in any way, premiums based upon the premium rate of 1.223%, or any premium rate, of the Third Party Plaintiffs' gross earnings or to induce them at all.

## IX.

Denies the allegation in Section IX of the First Cause of Action of the Third Party Complaint that the Third Party Plaintiffs did in fact rely upon the representations so made by Third Party Defendant, or any representations; admits that Third Party Plaintiffs did during the aforementioned negotiations continue to forward monthly to Fidelity via Third Party Defendant its gross earning reports, estimated premiums, and premium payments, all of the foregoing based upon the premium rate of 1.223% of Third Party Plaintiffs' gross earnings, but in this connection alleges that under and by virtue of the provisions of said policy No. SPL-1457, which said policy is now in the possession of Third Party Plaintiffs and its contents well known to them, the payments made and to be made by Third Party Plaintiffs to Fidelity were subject to subsequent audit by Fidelity to insure that the entire gross earnings of Third Party Plaintiffs had been reported to said last mentioned company and the proper percentage of said gross earnings duly paid thereon and Third Party Defendant was not required by the terms of its agreement with Third Party Plaintiffs or by operation of law to do anything other than to transmit said money so turned over to Third Party Defendant by Third Party

Plaintiffs to Fidelity without any audit by Third Party Defendant; denies that the representations made by the Third Party Defendant to the Third Party Plaintiffs, or any representations, were false and untrue; denies that Third Party Defendant knew at the time it made such representations, or at any time, or any representation, that said representations were in fact false and untrue; denies that on or about the 1st day of September, 1946, Third Party Defendant had received from Fidelity two certain policies of casualty insurance by Fidelity and Casualty Company of New York, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that Third Party Defendant received said policies on or about the 1st day of October, 1946, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contain provision for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to wit,

2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from Fidelity at the time that Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law, and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid.

## X.

Admits all of the allegations of Section X of the First Cause of Action of the Third Party Complaint except Third Party Defendant denies that any liability of Third Party Plaintiffs under this claim is the result of and was caused by the misrepresentations of Third Party Defendant as aforesaid, or any misrepresentations of Third Party Defendant at all.

Answer to Second Cause of Action of  
Third Party Complaint

I.

Third Party Defendant incorporates herein by reference and makes a part hereof as though fully set forth herein its admissions, denials and allegations set forth in Paragraphs I-VIII, inclusive, and Paragraph X of Third Party Defendant's hereinbefore set forth Answer to First Cause of Action of Third Party Complaint.

II.

Denies the allegation in Section II of the Second Cause of Action of the Third Party Complaint herein that the representations and suggestions so made by Third Party Defendant to Third Party Plaintiffs, or any representations and suggestions made by Third Party Defendant to Third Party Plaintiffs, or any representations and suggestions, were false and untrue; denies that Third Party Defendant in making such representations and suggestions or any representations or suggestions, had no reasonable ground for believing them to be true; admits that on or about the 1st day of October, 1946, Third Party Defendant had received from Fidelity two said policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly

and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs, as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to wit 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from the said Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by



law and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligations of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; denies that Third Party Plaintiffs relied upon the representations and suggestions so made by Third Party Defendant, or any representations and suggestions so made, or any representations and suggestions, and continued to forward to Third Party Plaintiffs premiums based upon the premium rate of 1.223% or any premium rate of their gross earnings.

Answer to Third Cause of Action of  
Third Party Complaint

I.

Third Party Defendant refers to Paragraphs I to VIII, inclusive, and Paragraph X of its Answer to the First Cause of Action of Third Party Complaint herein and incorporates its admissions, denials and allegations in said paragraphs by reference as though fully set forth herein, except that Third Party Defendant does not incorporate by reference and does not make a part herein the admissions, denials and allegations contained in its answer to that portion of Paragraph VIII of said First Cause of Action commencing with the word "that" on line 9, page 4, of said Third Party Complaint, and extending to and including the word: "earnings" on line 14, page 4, of said Third Party Complaint.



## II.

Admits the allegation in Section II of said Third Cause of Action of the Third Party Complaint herein that on or about the 1st day of October, 1946, Third Party Defendant had received from Fidelity two certain policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for increased premium rate of 2.20% of the Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to-wit. 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from the said Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of said

Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law, and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; admits that it was the duty of said Third Party Defendant as agent and broker of Third Party Plaintiffs to notify Third Party Plaintiffs of the receipt and acceptance by Third Party Defendant of said Policies SPL-20950 and SPL-20968 and to disclose to Third Party Plaintiffs, as the principal of Third Party Defendant, the fact of receipt and acceptance and particularly to notify said Third Party Plaintiffs that said policies contained provisions for increased premium rates as specified hereinbefore and to disclose said material fact to Third Party Plaintiffs as the principals of Third Party Defendant, and in this connection said Third Party Defendant alleges that it duly and timely performed said last mentioned duties and further alleges that at all times herein mentioned Third

Party Plaintiffs well knew that the only reason that the policies for the previous year had not been automatically renewed for the year commencing September 1, 1946, was that Fidelity was proposing and demanding an increased premium rate over the previous year and was proposing and demanding the signing of the Retrospective Agreement and further well knew that any and all insurance coverage negotiated by Third Party Defendant with Fidelity, which said coverage was required of Third Party Plaintiffs by law, must be at a premium rate higher than the preceding year and well knew said premium rate, to-wit, 2.20% of Third Party Plaintiffs' gross earnings; denies that Third Party Defendant concealed from and failed to notify Third Party Plaintiffs, or anyone, of the receipt of said policies and of the increased premium rate or any premium rate contained therein, and failed to disclose said facts, or any facts, to Third Party Plaintiffs with intent to induce Third Party Plaintiffs to believe that they continued to be protected and covered by insurance provided by Fidelity by the same premiums as were provided for in the policy above mentioned, SPL-1457, and particularly at the premium rate of 1.223% or any premium rate of the gross earnings of Third Party Plaintiffs, or with any intent, and with intent to induce them to forward to Fidelity insurance premiums based upon the rate of 1.223% or any premium rate of Third Party Plaintiffs' gross earnings, or any intent; denies that as the result of the failure of Third Party Defendant to disclose said facts, or any fact, or to notify said Third Party Plaintiffs of said facts, or any facts,

Third Party Plaintiffs have become liable to the Fidelity and Casualty Company of New York in the sum of \$7,841.99 or any sum, together with interest at the rate of seven per cent from and after October 27, 1947, as premiums due under said Policies SPL-20950 and SPL-20968, according to the allegations in Plaintiff's Complaint.

Answer to Fourth Cause of Action of  
Third Party Complaint

I.

Third Party Defendant refers to Paragraph I to VIII, inclusive, of its Answer to the First Cause of Action of Third Party Complaint herein and incorporates its admissions, denials and allegations in said paragraphs by reference as though fully set forth herein, except that Third Party Defendant does not incorporate by reference and does not make a part hereof the admissions, denials, and allegations contained in its answer to that portion of Paragraph VIII of said First Cause of Action commencing with the word "that" on line 1, page 4, of said Third Party Complaint, and extending to and including the word "earnings" on line 14, page 4, of said Third Party Complaint.

II.

Admits the allegations of Section II of the Fourth Cause of Action of the Third Party Complaint herein that on or about the 1st day of October, 1946, Third Party Defendant had received from

Fidelity two certain policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to-wit, 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations



covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; denies that Third Party Defendant carelessly and negligently, or in any way, failed, neglected and omitted to notify Third Party Plaintiffs or anyone of its receipt or its acceptance of Policies Nos. SPL-20950 and SPL-20968, and retained the same in its possession until August 7, 1947.

### III.

Admits all of the allegations of Section III of the Fourth Cause of Action of the Third Party Complaint herein, save and except that Third Party Defendant denies the liability, or any liability, of Third Party Plaintiffs to Fidelity has been and is the proximate result of any negligence or carelessness or any actions of said Third Party Defendant, or at all.

### Answer to First Cause of Action of Complaint of Plaintiff

#### I.

Third Party Defendant admits the allegations of Sections I, II, III, IV, V, VI, and VII of the First Cause of Action of Plaintiff's Complaint on file herein.



II.

Admits the allegations of Paragraph VIII of the First Cause of Action of Plaintiff's Complaint on file herein, save and except the policies herein referred to were delivered to Third Party Defendant as agent of Third Party Plaintiffs.

III.

Third Party Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Sections IX, X and XI of the First Cause of Action of Plaintiff's Complaint on file herein, and basing its denial upon such lack of knowledge or information, denies each and every, all and singular the allegations of said last mentioned sections.

Answer to Second Cause of Action  
of Plaintiff's Complaint

I.

Third Party Defendant refers to its admissions, denials and allegations to Paragraphs I to VI, inclusive, of the First Cause of Action of Plaintiff's Complaint on file herein and by this reference incorporates all of said admissions, denials and allegations in this its answer to the Second Cause of Action to Plaintiff's Complaint on file herein.

II.

Admits the allegations of Section II of the Second Cause of Action of Plaintiff's Complaint on file herein.

## III.

Admits the allegations of Section III of the Second Cause of Action of Plaintiff's Complaint on file herein, save and except Third Party Defendant alleges that the policies in question were delivered to it as agent for Third Party Plaintiffs.

## IV.

Third Party Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Sections IV, V, and VI of the Second Cause of Action of Plaintiff's Complaint on file herein, and basing its denial upon such lack of knowledge or information, denies each and every, all and singular the allegations of said last mentioned sections.

Wherefore, Third Party Defendant prays that it be dismissed hence without judgment rendered against it, for judgment or costs of suit against the Third Party Plaintiffs, and for such other and further relief as is meet and proper in the premises.

Dated: July 23, 1948.

/s/ ORLA ST. CLAIR,

/s/ ARTHUR H. CONNOLLY, JR.,

/s/ ST. CLAIR & CONNOLLY,

Attorneys for Third Party  
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1948.

In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 28049

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,  
a Corporation, et al.,

Defendants and Third  
Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,  
Third Party Defendant.

DAN HADSELL, ESQ.,  
JOE G. SWEET, ESQ.,  
EVERETT A. INGALLS, ESQ.,  
SYDNEY P. MURMAN,

405 Montgomery Street,  
San Francisco 4, California,  
Attorneys for plaintiff.

NORMAN A. EISNER, ESQ.,  
SAMUEL W. WICKLOW, ESQ.,  
Mills Building,  
San Francisco 4, California,  
Attorneys for defendants.

Erskine, District Judge

## MEMORANDUM OPINION

The evidence does not sustain defendants' contention that there was an oral extension of the binder. Both Cantlen, defendants agent, and Mettalia, one of plaintiff's officials, say there was no such agreement. Accordingly there is no basis for the contention that the rates provided for by the policy which expired September 1, 1946, were applicable from that date to the effective date of the cancellation of the insurance. Thus the sole question, insofar as plaintiff's claim against defendants is concerned, is whether or not there was an insurance in effect which superseded the binder up to said effective cancellation date. In short, the point to be determined as far as plaintiff and defendants are concerned is whether or not there was an effective issuance and delivery of the policies which made them binding upon the plaintiff and defendants. There is no doubt that the policies were made out and delivered to the agent of the insured within the sixty-day period provided in the binder. There is no doubt that the plaintiff considered them in effect. This is shown not only by the testimony of its officials, but by the fact that it did not cancel the filings with the Railroad Commission of California and the Interstate Commerce Commission, and that it defended claims made against the defendants. In short it treated and intended the issuance and delivery of its insurance policies to defendants as effective and binding upon it, even though it had not secured from defendants the retrospective agreement which it was demanding.

While the defendants' agent Cantlen testified at one time that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation. He received a claim against the defendants shortly after the delivery of these policies to him, and sent it to the plaintiff for defense with a covering memorandum referring to these policies by their numbers. A short time later, in November, 1946, he advised the American Manganese Company, a customer of the plaintiff, by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of these policies. He sent a copy of this letter to the defendants. He sent to plaintiff voluntary audits with specific reference to these policies. It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants' agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed. Accordingly I so find, and therefore find that the plaintiff is entitled to recover from defendants the amount of its claim, \$7841.99, together with legal interest thereon from October 22nd, 1947.

The fact that no deposit premium was paid and that plaintiff received premiums based upon the old rates are not, under the circumstances, inconsistent with the fact that these policies were then in effect.



This brings us to the controversy between the defendants and the third party defendant. According to the pleadings the defendants claim that their agent (the third party defendant) should pay any judgment obtained by plaintiff against defendants because (1) said agent advised defendants that the binder covered defendants until the negotiations respecting the new rates had been completed, and (2) the agent received and accepted the policies without telling defendants and in violation of defendants' instructions.

I find under the evidence that defendants' claim that they thought that the binder covered them until negotiations were completed is not supported by the evidence. Their chief official had the binder delivered to him. He says he did not read it. This binder provided that it would expire in sixty days and that when the policies were issued they would supersede the binder. This is so explicit in the binder that it is impossible for me to find that defendants could have believed that the binder was in effect after the sixty-day period. Insofar as their other claim against the third party defendant is concerned, I find that it is not supported by the evidence. They knew, or should have known, of the delivery of these policies to their agent. Cantlen says he told Coughlin that he had them, but whether he did or not makes no difference because the documentary evidence and the circumstances show that defendants knew, or should have known they were covered not by the binder, but by the policies. I will not attempt to refer to all of the facts and circumstances and docu-



ments supporting this conclusion, but will cite some of them. Coughlin, the defendants' chief executive, was very experienced in this line of business, and he knew that these defendants could not operate unless they had insurance, and therefore must have inquired and known that these policies had been issued. As heretofore stated, a copy of Cantlen's letter to the American Manganese Company was sent by him to defendants in November, 1946, which clearly showed that the policies were in force. Defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancellation date, even though some of these claims were not filed until after the defendants had in April, 1947 rejected plaintiff's claim for premiums figured upon the rates fixed by the policies. Defendants' secretary signed a gross receipt statement designating that it referred to one of these policies. These and other facts and circumstances brought out by the evidence support the conclusion that the defendants knew, or should have known that the binder expired at the end of sixty days; that the policies had been issued, delivered, and were effective; that they had superseded the binder; and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled.

In view of the foregoing, judgment will be rendered in favor of plaintiff and against defendants in the sum of \$7841.99, together with legal interest thereon from October 22, 1947, to the date of such judgment, and against the defendants and in favor

of the third party defendant, when appropriate findings of fact and conclusions of law, and judgment in pursuance thereof are signed and filed.

Dated: June 14th, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed June 15, 1950.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on September 30 and October 10, 11 and 17, 1947, Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the plaintiff, Messrs. Norman A. Eisner and Samuel W. Wicklow appearing as counsel for defendants and third party plaintiffs, and Orla St. Clair, Esq., of St. Clair and Connolly appearing as counsel for third party defendant, said cause being tried by the Court sitting without a jury, upon plaintiff's complaint, the answer and third party complaint of defendants and third party plaintiffs, and the answer of the third party defendant.

Thereupon witnesses were called by the respective parties and evidence, both oral and documentary,

was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. Briefs having been filed, said cause was duly ordered submitted for decision and judgment.

Wherefore, by reason of the premises, and having duly considered the law and the evidence, and having made and filed its memorandum opinion in said cause, the Court now makes the following

### FINDINGS OF FACT

(1) All of the allegations of plaintiff's complaint are true and correct.

(2) All of the allegations of third party plaintiffs' complaint as denied by third party defendant are untrue and incorrect.

(3) All of the allegations of third party defendant's answer are true and correct.

(4) At all times mentioned in said complaint, plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to transact and transacting a general casualty insurance business in California.

(5) At all times mentioned in said complaint defendants and third party plaintiffs, California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were corporations, and each of them was a corpora-

tion, organized and existing under and by virtue of the laws of California and engaged in the business of highway carriers in California.

(6) At all times mentioned in said complaint defendants and third party plaintiffs James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin were citizens and residents of California and copartners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

(7) At all times mentioned in said complaint defendant and third party plaintiff James C. Coughlin, a citizen, and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in Los Angeles, California.

(8) At all times mentioned in said third party complaint, third party defendant Bayly, Martin & Fay, Inc., also known as Bayly, Martin & Fay, Inc. of California, was and is a corporation duly organized and existing under and by virtue of the laws of the State of California and having a license to act, and acting in said state as an insurance broker.

(9) At all times mentioned in said third party complaint, said third party defendant was the duly appointed and acting, and was acting as agent and broker for the placing and maintenance of casualty insurance, including comprehensive, public liability

and property damage insurance, for and on behalf of defendants and third party plaintiffs.

(10) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

(11) On or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of primary casualty insurance known as "Comprehensive General—Automobile," Policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants and third party plaintiffs, and each of them, for one year against bodily injuries, with limits of liability of \$10,000.00 each person and \$20,000.00 each accident, and property damage, with limits of liability of \$5,000.00 each accident, as arising out of the ownership, maintenance and use of certain automobiles and trucks by defendants and third party plaintiffs, and each of them, in their business, at the premium rate of \$2.00 per \$100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(12) Also at the request of said defendants and third party plaintiffs, and each of them, plaintiff



then and there made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as "Comprehensive General—Automobile," Policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in said Policy No. SPL 20968, insuring said defendants and third party plaintiffs, and each of them, for one year against bodily injury, with limits of liability of \$100,000.00 each person and \$300,000.00 each accident, and property damage, with limits of liability of \$5,000.00 each accident as arising out of the ownership, maintenance and use of said automobiles and trucks by said defendants and third party plaintiffs, and each of them, in their business, all in excess of said primary coverage afforded by said Policy No. SPL 20968, and at the premium rate of \$.20 per \$100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(13) Thereafter plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs, and each of them, following which said defendants and third party plaintiffs reported claims and lawsuits under said policies to plaintiff, and pursuant to voluntary audit each month of said defendants and third party plaintiffs, said defendants and third party plaintiffs remitted



monthly premium payments to plaintiff, said payments being received by plaintiff on account of the total earned permium and subject to final audit by plaintiff at said rates at the end of said period of said policies.

(14) On or about December 19, 1946, plaintiff, pursuant to the terms of said policies, caused written notices of cancellation of said policies to be mailed to defendants and third party plaintiffs, and each of them, at the address shown on said policies, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947. Pursuant to law, and on or about December 20, 1946, plaintiff notified said Railroad Commission of said notice of cancellation to defendants and third party plaintiffs, and each of them, of said Policy No. SPL 20968. On January 21, 1947, said policies were cancelled in accordance with said notices, and each of them.

(15) Prior to said cancellation, and in accordance with said voluntary monthly audits made by defendants and third party plaintiffs, and each of them, defendants and third party plaintiffs paid to plaintiff the total sum of \$9,131.13 on account of the total earned premium of said Policy No. SPL 20968 for the period from September 1, 1946, to January 21, 1947.

(16) Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premiums on said policies for the period

from September 1, 1946, to January 21, 1947, to be computed by final audit at said rates totaling \$2.20 per \$100.00 of gross earnings of defendants and third party plaintiffs, said premiums so computed being in the total sum of \$16,973.12, leaving an unpaid balance of said total earned premiums in the sum of \$7,841.99 due plaintiff from defendants and third party plaintiffs, and each of them.

(17) On October 27, 1949, plaintiff made demand on defendants and third party plaintiffs, and each of them, for said unpaid balance, and no part of said unpaid balance of said total earned premiums due plaintiff has been paid by said defendants and third party plaintiffs.

(18) Third party defendants at no time, or at all, represented to defendants and third party plaintiffs that a certain binder made, executed and issued by plaintiff on or about August 27, 1946, to defendants and third party plaintiffs and delivered by third party defendant to defendants and third party plaintiffs covered said defendants and third party plaintiffs until negotiations respecting the aforesaid policies had been completed, and in this connection third party defendant at no time made representations to defendants and third party plaintiffs that were false and untrue or that third party defendant had reasonable ground for not believing to be true.

(19) Third party defendant received and accepted the aforesaid policies from plaintiff with the knowledge of and in accordance with the in-

structions of said defendant and third party plaintiffs, and each of them, and in this connection third party defendant at no time concealed from and failed to notify defendants and third party plaintiffs of the receipt of said policies from plaintiff, nor did third party defendant prior to August 7, 1947, negligently fail, neglect and omit to notify said defendants and third party plaintiffs, and each of them, of the receipt of said policies and the retaining of the same in the possession of the third party defendant.

From the foregoing findings of fact, the Court makes the following

#### Conclusions of Law

(1) There is now due, owing and unpaid to plaintiff from defendants and third party plaintiffs, and each of them, the total sum of \$7,841.99, together with interest at the rate of 7% per annum from and after October 27, 1947.

(2) Plaintiff is entitled to recover from defendants the sum of \$7,841.99, together with interest thereon at the rate of 7% per annum from October 27, 1947.

(3) Third party plaintiffs shall have and recover nothing from third party defendant.

(4) Plaintiff and third party defendant are entitled to recover their respective costs of suit herein from defendants and third party plaintiffs.

Let an appropriate judgment be entered upon these findings of fact and conclusions of law.

Dated this 25th day of September, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1950.

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In the District Court of the United States, for the  
Northern District of California, Southern Division

No. 28049

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO.,  
LTD., a Corporation, et al,

Defendants and Third  
Party Plaintiffs.

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,  
Third Party Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable

Herbert W. Erskine presiding, on September 30, October 10, 11 and 17, 1949, Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman, appearing as counsel for plaintiff, Messrs. Norman A. Eisner and Samuel W. Wicklow appearing as counsel for defendants and third party plaintiffs, and Orla St. Clair, Esq., of St. Clair and Connolly appearing as counsel for third party defendant, said cause being tried by the Court sitting without a jury, upon plaintiff's complaint, the answer and third party complaint of defendants and third party plaintiffs, and the answer of the third party defendant.

Thereupon witnesses were called by the respective parties and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. Briefs having been filed, said cause was duly ordered submitted for decision thereafter rendered on June 15, 1950.

Now, Therefore, by virtue of the law, and by reason of the findings of fact and conclusions of law heretofore made and filed by the above-entitled Court on September 25, 1950, It Is Ordered. Adjudged and Decreed that plaintiff have and recover of and from defendants the sum of Seven Thousand Eight Hundred Forty-one and 99/100 Dollars (\$7,841.99), together with interest thereon at the rate of seven per cent (7%) per annum from October 27, 1947.



It Is Further Ordered, Adjudged and Decreed that third party plaintiffs shall have and recover nothing from third party defendants.

It Is Further Ordered, Adjudged and Decreed that plaintiff and third party defendant have and recover of and from defendants and third party plaintiffs their respective costs of suit herein, taxed in the sum of \$49.70 as to plaintiffs and in the sum of \$20.00 as to third party defendant.

Dated this 4th day of October, 1950.

/s/ HERBERT W. ERSKINE,  
Judge U. S. District Court.

Lodged September 28, 1950.

[Endorsed]: Filed October 4, 1950.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL TO COURT OF APPEALS FOR NINTH CIRCUIT

Notice is hereby given that California Motor Transport Co., Ltd., a corporation, California Motor Express. Ltd., a corporation, Valley and Coast Transit Company, Coast Line Express, a corporation, Sunset Transfer Company, a corporation, Red Line Transfer Company, a co-partnership, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Morton, co-partners d.b.a. Red Line Transfer Company, James Coughlin



d.b.a. Red Line Transfer Company, Defendants and Third Party Plaintiffs, above named, hereby appeal to the Court of Appeals for the Ninth Circuit, from the Final Judgment entered in this action on October 5, 1950, and the whole thereof.

Dated: October 17th, 1950.

/s/ NORMAN A. EISNER,  
Attorney for Defendants  
And Appellants.

[Endorsed]: Filed October 17, 1950.

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[Title of District Court and Cause.]

APPELLANTS DESIGNATION OF RECORD,  
PROCEEDINGS AND EVIDENCE TO BE  
CONTAINED IN THE RECORD ON AP-  
PEAL

Appellants, Defendants and Third Party Plaintiffs in the above-entitled action, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1. The Complaint.
2. The Answer.
3. The Third Party Complaint.
4. The Order granting motion to bring in third party defendant.
5. The answer of third party defendant.

6. The complete Reporter's Transcript of all the oral proceedings before the Trial Court, including the testimony of all witnesses, objections and arguments of counsel and rulings of the Court.

7. The Opinion of the Trial Court.

8. Plaintiffs' exhibits 1-20 inclusive, defendants exhibits A-N inclusive, Third party defendants exhibits AA-SS-4 inclusive.

9. The findings of fact and conclusions of law.

10. The Judgment.

11. The Notice of Appeal with date of filing.

12. This designation.

13. All other documents making up the judgment roll in this action.

/s/ NORMAN A. EISNER,  
Attorney for Defendants  
And Appellants.

[Endorsed]: Filed October 17, 1950.

In the Southern Division of the United States  
District Court for the Northern District of  
California

Before: Hon. Herbert W. Erskine,  
Judge.

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY  
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO.,  
LTD., a Corporation; CALIFORNIA MOTOR  
EXPRESS, LTD., a Corporation; VALLEY  
AND COAST TRANSIT COMPANY, COAST  
LINE EXPRESS, a Corporation; SUNSET  
TRANSFER COMPANY, a Corporation; RED  
LINE TRANSFER COMPANY, a Co-partner-  
ship; JAMES C. COUGHLIN, WILLIAM  
COUGHLIN, JOSEPH COUGHLIN, WAR-  
REN COUGHLIN and ROSE MORTON, Co-  
partners, d.b.a. RED LINE TRANSFER  
COMPANY, JAMES COUGHLIN d.b.a. RED  
LINE TRANSFER COMPANY,

Defendants and Third  
Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,  
Third Party Defendants.

## REPORTER'S TRANSCRIPT

## Appearances:

For Plaintiff:

SIDNEY MURMAN, ESQ.

For Defendants and Third Party Plaintiffs:

NORMAN EISNER, ESQ.

For Third Party Defendants:

ORLA ST. CLAIR, ESQ.

Friday, September 30, 1949—10 A.M.

The Clerk: Fidelity and Casualty Company v. California Motor Express Company, for trial.

Mr. Murman: Ready.

Mr. Eisner: Ready.

Mr. St. Clair: Ready.

Mr. Murman: If the Court please, I am Mr. Murman and I represent Fidelity and Casualty Company, the plaintiff in this action. This is an action which on its face might appear to be a bit complicated at the outset, your Honor, for the reason that there is a complaint filed, then an answer filed to the complaint, then a third party complaint filed, an answer filed to that complaint.

The Court: As I understand it—as I read the pleadings over very quickly this morning, I understand the claim by the plaintiff is for premiums on insurance.

Mr. Murman: Additional premiums, your Honor.

The Court: The claim of the defendant and the third party plaintiff is to the effect that there is an agency, the third party defendant, that is responsible for it.

Mr. Murman: That is correct, your Honor. The defendant in this case has, as I understand, by the third party complaint brought action against the broker.

The Court: Yes, the broker is charged with not telling [2\*] them about the increase in the rate and about the insurance policy.

Mr. Murman: That is the gist of it.

The Court: \$2.20 from \$1.20, I think.

Mr. Murman: Something like that. \$1.22 to \$2.20. We expect to show, your Honor, that the insurance was issued and delivered and that claims were rendered under it which were paid by the company; that, as a matter of fact, almost a year following the issuance of the insurance, and following the dispute having arisen, the insured referred a lawsuit to the company for defense, which suit was successfully defended on behalf of the assured.

Our position is that the contract is a binding agreement between the parties; that if there was lack of knowledge on the part of the assured at the outset, that that lack of knowledge was sufficiently brought to the attention of the assured and the contract was approved, ratified by the subsequent action of the assured in referring the matter to the company for defense which arose during the policy period.

Mr. Eisner, did you bring the original policy?

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



Mr. Eisner: I did.

Mr. Murman: May I have it at this time?

Mr. Eisner: Have you finished your statement, Mr. Murman? I would like to make a statement as to matters on defense. [3]

Mr. Murman: Yes.

The Court: Yes, you can either make it now or reserve it.

Mr. Eisner: I want to make one statement. The claim—I think, your Honor, has grasped them, but the defendants deny liability to the plaintiff on the ground that these policies were never issued, never came into evidence, and that during the period from September 1, 1946, until January, 1947, the defendant and third-party plaintiff was covered by a binder during that period continuing in effect the policy that was in existence during the preceding year, in other words, the policy from September 1, 1945, to September 1, 1946, and that during the interval from September 1, 1946, until January, 1947, there were negotiations going on for policies, but that these policies never came into existence and that a binder covered the parties during that interval and carried over on the former policy at the preceding rate.

Then there is the defense of waiver and estoppel as against the plaintiff because from September 1, 1946, until January, 1947, after these policies were terminated, the third-party plaintiff and defendant continued to make and render monthly statements and reports and made monthly remittances to the

plaintiff in the action through their collection agency, the Bayly, Martin & Fay, and in these monthly reports the premium was set forth and detailed at the rate set forth in the former policy, No. 1457, which is the former policy; [4] and remittances were made on that basis, which were accepted, retained, never protested, and it wasn't until approximately August, 1947, eight months after the acknowledged termination of the claimed policy before any claim was made by the plaintiff in the action, through the third-party defendant or otherwise, that there wasn't a correct remittance and that the premiums had not been correctly calculated.

And then there is, as your Honor intimated, a third party, the broker for the insurance, because if these policies ever came into existence the broker did not disclose the information, did not deliver the policies to the insured, delivered to the insured a binder, and who was led to believe that the binder covered during the interval and during the period that the negotiations were going on and during the period, as will develop, that the plaintiff wanted a new kind of insurance agreement signed, which they refer to as a retrospective agreement.

I think that is a brief statement of our position and the rest will be developed in the evidence.

Mr. St. Clair: I represent the broker, the third-party defendant. My pleadings are extensive and in detail, and I prefer to hold my statement until we can proceed with our defense.

Mr. Murman: May I have the policies now, Mr. Eisner?

Mr. Eisner: Which ones do you want? [5]

Mr. Murman: The two I demanded, SPL-20968 and SPL-20950. While Mr. Eisner is getting the policies, there is a primary policy issued which, oddly enough, bears No. 20968, and the later number, the excess policy, bears No. 20950.

The Court: I noticed that in the pleadings.

Mr. Murman: Mr. Mettalia, will you take the witness stand, please.

### CHARLES A. METTALIA

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: Charles A. Mettalia.

### Direct Examination

By Mr. Murman:

Q. What is your business, Mr. Mettalia?

A. I am Casualty Superintendent of the Fidelity Casualty Company.

Q. How long have you been so employed?

A. Twenty years.

Q. Do you know Mr. Cantlen, a person who is named, or whose name comes into this case?

A. Yes, I do.

Q. And who is he connected with, if you know?

A. Bayly, Martin & Fay.

Q. They are third-party defendants in this case, are they not? [6]           A. They are.

Q. How long have you been in San Francisco?

A. Since November, 1945.

(Testimony of Charles A. Mettalia.)

Q. Prior to that time you were located where?

A. New York City. Our branch office in New York City.

Q. Now, prior to coming to San Francisco did you have any knowledge of the relationship between the plaintiff in this case and the defendants?

A. No, I didn't.

Q. When you came to San Francisco in November, 1945, did knowledge of the relationship between the plaintiff and the defendants come to your attention?      A. Yes.

Q. About when was that?

A. Oh, several months later. I would say about February or March.

Q. Of what year?      A. 1946.

Q. What was the occasion of the matter coming to your attention at that time?

A. I was appointed Casualty Superintendent for Fidelity and Casualty Company, and being in charge of that department I would familiarize myself with some of the more important risks we had on our account in this area.

Q. It was in the course of discharging that duty that you [7] became informed of this relationship, is that right?      A. Yes.

Q. How long has F. and C., plaintiff in this case, been doing business with the defendants?

A. Oh, I would say since about 1940 or 1941.

Q. And in the successive years that intervened had there been insurance placed annually and repeatedly?      A. Yes.

(Testimony of Charles A. Mettalia.)

Q. Each policy had followed the other in order, is that correct?      A. That is correct.

Q. In 1946 what sort of policy was in effect as between the plaintiff and the defendants in this case?

Mr. Eisner: What part of 1946 do you refer to?

Mr. Murman: During the year commencing September 1, 1945, and extending to September 1, 1946.

A. Well, it is what we call a broad form liability, our symbol being "SPL," a special public liability contract.

Q. Do you remember whether or not that policy had a number?      A. Yes, it did.

Q. Do you recall the number?

A. No, I don't.

Mr. Eisner: It was 1457.

Mr. Murman: Yes, there is no dispute.

Mr. Eisner: No. [8]

Mr. Murman: There is no dispute about the effect of No. 1457?

Mr. Eisner: That is correct.

Q. (By Mr. Murman): That particular policy, SPL-1457, Mr. Mettalia, expired when?

A. September 1, 1946.

Q. Prior to the expiration date did you have any conversation about that insurance on the same risk?      A. Yes, I did.

Q. About when did those conversations take place?

A. Are you referring with the broker or—I had a conversation——



(Testimony of Charles A. Mettalia.)

Q. Let's put it this way: When did conversations first take place in connection with any insurance following the expiration of SPL-1457?

A. On or about the beginning of July.

Q. Of what year? A. 1946.

Q. With whom did those conversations take place? A. With our San Francisco office.

Q. There was some discussion within the company itself, in other words, is that right?

A. That is right.

Q. Now, following that discussion did you have, at a later date, any discussion with Mr. Cantlen?

A. Yes, I did.

Q. When did the conversations with Mr. Cantlen take place, the first one you recall?

A. On or about the beginning of August.

Q. 1946? A. Yes.

Q. Where did it take place?

A. In the San Francisco office, No. 60 Sansome Street.

Q. That is your office?

A. That is correct.

Q. And who else was present besides yourself and Mr. Cantlen?

A. I think there was just Mr. Cantlen and I.

Q. Prior to this conversation in August, 1946, with Mr. Cantlen had you had any previous conversations with him? I mean, did you know him before?

A. Yes, I knew him as a representative of

(Testimony of Charles A. Mettalia.)

Bayly, Martin & Fay, and handling the account for the California Motor Transport.

Q. Defendants in this cause? A. Yes.

Q. You understand there are several defendants, but they are all generally referred to as California Motor Transport people?

A. That is correct.

Mr. Eisner: I think we might stipulate that reference [10] to California Motor Transport, referred to in this case, we refer to all defendants jointly.

Mr. Murman: That is correct. All defendants are named in the indictment and also named in the policy.

Mr. Eisner: In the indictment?

Mr. Murman: I am sorry. I meant the complaint.

Q. Now, Mr. Mettalia, what was the conversation in August, 1946?

A. Well, we were reviewing the losses and the premiums. In other words, we were making an evaluation of the risk.

Q. Was that after the 1946 contract, that is, SPL-1457?

A. No; as a matter of fact, it was the 1946, 1945, 1944, 1943, and way back to the original contract that we had for this insured.

Q. You were reviewing the full insurance experience up to that time, is that right?

A. That is correct.

Q. You did that for Mr. Cantlen, the broker for the defendants in this case? A. Yes.

(Testimony of Charles A. Mettalia.)

Q. What did Mr. Cantlen say to you at that time and what did you say to him as broker? You don't have to give the exact words, but the substance of the conversation.

A. Well, we reviewed the losses and it indicated a loss ratio much, very much in excess of what we call a permissible [11] loss ratio. Under the conditions, we needed more money to carry on the following year.

Q. Did you say that to Mr. Cantlen?

A. Yes, I did.

Q. What did he say?

A. He had agreed with me that it was definitely developing such a loss ratio that the premium should be increased at renewal.

Q. What was the premium for the issuing of Policy SPL-1457?

A. We had a rate of 1.23 or something like that.

Q. Per what? The rate was so much per what?

A. Per \$100 of receipts.

Q. Gross receipts? A. Gross receipts.

Q. Of the assured? A. Yes.

Q. The policy on issuing the policy was to be determined by taking the gross receipts of the assured and multiplying those gross receipts by \$1.223, is that correct? A. That is correct.

Q. Did that contract require a final audit following this policy? A. Yes.

Q. I mean Policy No. SPL-1457.

A. Yes. [12]

(Testimony of Charles A. Mettalia.)

Q. Was that true of the preceding contracts?

A. Yes.

Q. So that the final premium was to be determined following the expiration of the contract?

A. That is correct.

Q. By final audit? A. That is correct.

Q. That had always been the situation?

A. Yes.

Q. Following that conversation with Mr. Cantlen in which you stated that an increase in the premium was necessary—I believe that is what you said, isn't that right? A. Yes.

Q. He, as you said, agreed to it?

A. That is correct.

Q. What happened?

A. Then we worked up a rate which would be subject to Bureau approval.

Q. When you say "Bureau approval," what do you mean?

A. Well, during the period prior to 1948 all rates were governed, that is, ratings of bureau companies, were governed by the National Bureau of Casualty and Surety Underwriters, and any rate we might discuss would be subject to their final approval before we could use that rate. We then submitted our rates to the Bureau. [13]

Q. Was that Bureau limited to your company or did it extend over other companies?

A. It extended to, oh, as far as number I don't know, but I would say the majority of the com-

(Testimony of Charles A. Mettalia.)

panies are members of the National Bureau, or they may be advisory members so that they use these statistics of the National Bureau and accept their rating all over the country.

Q. The Bureau, then, is an industry bureau in that sense?

A. That is correct, and they would keep all these statistics so that they could be governed in making up rates.

Q. Mr. Mettalia, I show you—did you see this, Mr. St. Clair. I am sorry. (Handing document to counsel.)

Mr. Mettalia, I show you what purports to be a copy of the notice that you just referred to as having been sent to the Bureau, and ask you if that in fact is such a copy?           A. That is correct.

Mr. St. Clair: May I ask the date of that, Mr. Murman?

Mr. Murman: It bears date September 19, 1946.

Q. Mr. Mettalia, I show you down in the lower right-hand corner of the face of this notice some handwriting, and ask you if you are familiar with that handwriting as to the person who wrote it?

A. Yes, I am. I know the person very well.

Q. Whose handwriting is it?

A. Mr. Frank J. Van Horn. He was assistant manager of the [14] National Bureau in charge of the West Coast office.

Mr. Murman: At this time, if the Court please,



(Testimony of Charles A. Mettalia.)

I will offer in evidence as Plaintiff's Exhibit 1 the notice identified by the witness.

Mr. Eisner: We object to this, if the Court please, as incompetent, irrelevant and immaterial, not binding upon the defendant and third-party plaintiff in this case. I mean, it is simply a procedure apparently followed without the knowledge of the insured, and apparently to obtain the approval of some unofficial organization of which the plaintiff was a member and of which the insured had no information, and what communications transpired between the insurance company and any of its organization, or an organization of which it was a member, would be hearsay, incompetent and immaterial so far as the insured was concerned.

Mr. St. Clair: May I inquire, before I join in the objection, if it is being offered against the third-party defendant?

Mr. Murman: Well, the case I am putting in is against the defendant in the case, Mr. St. Clair.

Mr. St. Clair: Insofar as it may be offered against the third-party defendants we join in the objection of Mr. Eisner.

The Court: Overruled, subject to a motion to strike if it isn't connected up. [15]

(The notice was marked Plaintiff's Exhibit 1 in evidence.)

Q. (By Mr. Murman): Mr. Mettalia, prior to compiling this notice which bears date September 19, 1946, what, if anything, had been done concern-

(Testimony of Charles A. Mettalia.)

ing the premium rates as set forth in the notice?

A. Well, we had discussed this rate with our home office. We also discussed this rate with our broker, Mr. Cantlen.

Q. You say "our broker"?

A. I mean the broker for the insurance company.

Q. Was Mr. Cantlen employed by the F. and C.?

A. No, he wasn't.

Q. Did he have any connection with F. and C. from the standpoint of receiving any funds from them, or anything of that character?

A. No.

Q. So you did, prior to sending this notice, discuss the premium rate with Mr. Cantlen?

A. Yes.

Q. Was that discussion before September 1, 1949, the date on which the policy No. SPL-1457 expired?

A. Yes.

The Court: You mean the date it expired?

Mr. Murman: The date before the date it expired, your Honor. It expired, I believe Mr. Mettalia testified, on September 1, 1946. That is SPL-1457. [16]

Q. Isn't that right, Mr. Mettalia?

A. That is correct.

Q. This discussion with Mr. Cantlen concerning the premium was before that date?

A. That is correct.

Q. Do you remember about when it was?

A. Oh, I would say about the latter part of August, 1946.

(Testimony of Charles A. Mettalia.)

Q. Where did it take place, do you recall?

A. 60 Sansome Street, my office.

Q. What did you tell Mr. Cantlen at that time and what did he say to you?

A. We proposed these rates, which were subject to National Bureau approval.

Q. You told him you were proposing the rates subject to the National Bureau approval?

A. Yes.

Q. What rates did you tell him you were proposing?

A. \$2 for the primary coverage and 20 cents for the excess coverage.

Q. Is that \$2 per \$100 for gross receipts?

A. Yes.

Q. And 20 cents per \$100 gross receipts for the excess?

A. That is correct.

Q. A total premium for its policies of \$2.20 for \$100 gross receipts? [17]

A. That is correct.

Q. You stated that to Mr. Cantlen before the expiration date of SPL-1457, correct?

A. That is correct.

Q. You told him those rates were subject to approval by the Bureau?

A. Yes.

Q. Did you tell him you were going to notify the Bureau of those rates if he approved them? Withdraw that question. I am assuming something not yet in evidence.

What did Mr. Cantlen say when you gave him those figures?

A. Oh,—

(Testimony of Charles A. Mettalia.)

Q. Well, I don't mean exactly. What in substance, was his reply?

A. That the rate was reasonable because of the past experience and other conditions that arose in the industry as a whole.

Q. What, if anything, did he say about your statement that they were going to be referred to the Bureau? Did he say anything about that?

A. No, but—I don't recall.

Q. But you do recall you told him the rates were subject to the Bureau approval, is that right?

A. Yes, that is correct.

Q. Following this was there anything else in that conversation that bears on this matter that you can recall? [18]

A. Well, no. We went over these figures extensively. I remember roughly that the percentages of loss ratio certainly were unbalanced.

Q. Did you tell him what they were at that time? A. Yes, I did.

Q. What did you tell him?

A. The premiums were approximately—that is, over the period we were on the risk—\$66,000 with about \$77,000 or \$78,000 in losses.

Q. You told Mr. Cantlen that? A. Yes.

Q. That was in the same conversation where you told him about the insurance premium rates being subject to the Bureau approval, is that right?

A. That is correct.

Q. Following that conversation, what, if anything, was done about the new policies?

(Testimony of Charles A. Mettalia.)

A. We finally agreed on the rates. I submitted my formula to the National Bureau. The policies could not be issued until that approval was forthcoming, so that we had to issue a binder pending the approval of the Bureau, so we proceeded with the binder and then when the National Bureau approved the rates, why, we went ahead and issued the policy.

Q. Now, at the time you issued the binder were there any numbers assigned to the prospective new policies? [19]

A. Yes, we had to assign a number to the policy because—to the insured, because of certain Federal and State filings we had to make.

Q. What were those filings to be?

A. We had to make a Railroad Commission filing, which is now known as the Public Utilities Commission, and also had to make a filing for the ICC, otherwise they would immediately stop the operations of the California Motors.

Q. So at the time the binder was issued, following this conversation with Mr. Cantlen and prior to the approval by the Bureau, you did assign policy numbers to these prospective contracts and make the filings with the Railroad Commission and the ICC?

A. Yes; otherwise——

Q. And about—pardon me.

A. Otherwise the binder wouldn't be very much value to an insured without these filings.

Q. By the way, Mr. Mettalia, the filings with the Railroad Commission and the ICC were only



(Testimony of Charles A. Mettalia.)

as to the primary insurance, isn't that correct?

A. Yes, because that is all they require.

Q. That is the minimum?

A. That is the limit that the ICC and the Railroad Commission require.

Q. That satisfied the minimum limit? [20]

A. That is correct.

Q. At this time I show you what purports to be a copy of the filing with the Railroad Commission of the State of California and ask you if it is—if you identify it as such.

A. That is correct.

Q. I notice it carries the stamp of the "Railroad Commission, State of California, August 28, 1946, Transportation Department." Does that recall to you on or about the date it was filed?

A. Yes, this was filed with the Railroad Commission on August 27, which is the date there, and it was accepted by the Railroad Commission on August 28.

Q. 1946? A. 1946.

Q. That was before the expiration date?

A. That is correct.

Q. On the then existing policy SPL-1457?

A. That is correct.

Q. On this filing I note you have stated the policy number SPL-20968.

A. That is correct.

Q. Is that the number assigned to the primary policy of the new policies?

A. Yes.

Mr. Murman: At this time I offer in evidence as [21] plaintiff's exhibit next in order the copy identified by the witness.

(Testimony of Charles A. Mettalia.)

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 2 in evidence.)

Q. (By Mr. Murman): You said there was a filing made with the ICC. Was that made by the San Francisco office?

A. No. All ICC filings are controlled by our New York office, at our direction, of course.

Q. What is the procedure as to the ICC filing, for the information of the Court, in connection with this particular filing, do you recall?

A. Well, we usually send a wire or memorandum to our home office to instruct them to file the ICC. They will file it and then they will confirm that filing to us. They will send us a form letter that the filing has been made.

Q. That is all you receive back which you would have in your file here, that such a filing was made?

A. That is correct.

Q. And again, the filing is limited to the primary policy, is that correct? A. Yes.

Q. I think I asked that before. I am sorry.

A. Yes.

Q. At this time, Mr. Mettalia, I show you what purports to be a telegram from you to the New York office of your company, [22] together with a reply from that office to your office, to your attention, a telegram——

I believe, your Honor, I have anticipated a matter here. I think I have the wrong telegram, and the

(Testimony of Charles A. Mettalia.)

wrong answer. I will have to withdraw the offer at this time.

Mr. Eisner: May I have that, counsel, please? I want to use it.

Mr. Murman: I am going to offer it later on. I am not going to withhold it, but it is in the wrong chronology.

Mr. Eisner: I want to make a note of it.

Mr. Murman: All right.

Q. I don't seem to have such a wire and letter here in my file, Mr. Mettalia. Do you recall one having been sent and received back in this case?

A. Oh, yes.

Q. Now, was that wire sent about the time that the filing was made with the Railroad Commission of California? A. Yes.

Q. Do you know whether or not that filing was made before the expiration date of SPL-1457?

A. Yes.

Q. That is, the filing with the ICC?

A. I am sure of it.

Q. Did that filing refer to SPL-20968, the primary, new policy? [23] A. Yes, sir.

Q. Referring to Plaintiff's Exhibit 1 in evidence, the identified signature of Mr. Van Horn, I see under that signature "9/25/46." Did you receive the notice back with that signature and date endorsed on it as "9/25/46"? A. Yes.

Q. What if anything did you do after you received the Bureau approval?

(Testimony of Charles A. Mettalia.)

A. We proceeded with the issuance of the policies.

Q. To whom were the policies given?

A. Bayly, Martin & Fay.

Q. Any one individual in that organization?

A. Oh, I don't know. I suppose——

Q. Not what you suppose. Do you recall whether they were sent by a letter of transmittal, or was it a manual delivery?

A. It was a manual delivery.

Q. It was a manual delivery? A. Yes.

Q. To Bayly, Martin & Fay?

A. That is correct.

Q. But you don't know at this time to whom that delivery was actually made? A. No, I don't.

Q. At this time, Mr. Mettalia, I show you policy No. SPL-20968, which purports to be the original policy, and ask you [24] whether or not you can identify it as such and as one of those two policies delivered to Bayly, Martin & Fay.

A. That is correct. This is the original policy.

Mr. Murman: At this time, if the Court please, I ask that the policy identified by the witness be marked Plaintiff's exhibit next in order in evidence.

The Court: Admitted.

(The policy was marked Plaintiff's Exhibit 3 in evidence.)

Q. (By Mr. Murman): I also show you, Mr. Mettalia, policy No. SPL-20950, which purports to be the original policy, and ask you whether or not

(Testimony of Charles A. Mettalia.)

that is one of those two policies delivered to Bayly, Martin & Fay at the time you stated.

A. That is correct.

Mr. Murman: I make a similar offer as to this policy, your Honor.

The Court: What is that? No. 20950?

Mr. Murman: Yes, your Honor, 20950.

(The policy was marked Plaintiff's Exhibit 4 in evidence.)

Mr. Murman: At this time, if the Court please, I would like to call to your Honor's attention the fact that on the face and in the endorsements of this policy it is provided that the rate is subject to final audit.

Q. Attached to the policy as an endorsement is a printing entitled "Premium periodically adjusted for casualty payroll policies only." This reads, "It is hereby agreed that each [25] months the premium for the preceding period of the policy shall be determined upon the actual basis for such period, and the insured shall immediately pay the additional premium due. In accordance with the provisions of the policy the insured shall file with the company promptly upon the completion of each of such periods, a written statement of the actual basis of the premium for the said period. It is further understood and agreed that the advance payment made by the insured on account of the premium for this policy shall not be credited until the last payment under the foregoing endorsement is due. This



(Testimony of Charles A. Mettalia.)

endorsement shall not be binding upon the company unless countersigned by a duly authorized representative of the company."

Then it bears the proper dates and countersignature.

Mr. Eisner: What is the number of that rider, please?

Mr. Murman: It doesn't bear a number, Mr. Eisner, but does have a form number. It is the first endorsement under the face of the policy and it is Form No. L-1403D.

Special endorsement No. 7 attached to the policy reads as follows: "In consideration of the premium at which this policy is issued it is hereby understood and agreed that the policy does not apply under coverage 'A' except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining." Under that appears [26] "Premium determination. Estimated annual gross earnings."

Q. Mr. Mettalia, do you recall where that estimated annual gross earnings came from that appears there in the policy, \$1,500,000?

A. Well, it would be one of two ways we got that, either from the broker or our previous annual overall audit that we made.

Mr. Murman: Then it is provided, your Honor: "Rate per \$100 of gross earnings, \$2. Estimated annual premium, \$30,000." Under that in regular

(Testimony of Charles A. Mettalia.)

typewritten language is this: "Final premium to be determined by audit." That bears the dates, as do the other endorsements, and countersigned signatures.

There is also attached hereto as an endorsement the endorsement showing the filing with the ICC. That is as to the primary insurance. It, by the way, your Honor, referred on the face of the policy to "Excess" by "Number of preceding policy, SPL-1457. See also SPL-20950." The excess policy, which bears the lower number, SPL-20950, has a similar endorsement exactly the same as the endorsement I read to you first on the other policy, your Honor. That again bears the same form number, Mr. Eisner. No endorsement number.

Now, the endorsement that is similar to the one I read in the preceding policy, your Honor, that was numbered 7, is in this policy numbered No. 10, and it provides: "Premium determination, estimated annual gross earnings, \$1,500,000." [27] The same figure. "Rate per \$100 of gross earnings, \$.20. Estimated annual premium, \$3,000. Final premium to be determined by audit."

This, of course, is the excess policy, but it has the same endorsements in it in connection with the determination of the premium.

Q. Now, Mr. Mettalia, as to Plaintiff's Exhibits 3 and 4, the policies in question, there appears on the face of each that the policy period is from September 1, 1946, to September 1, 1947. Can you state whether or not there was any different policy

(Testimony of Charles A. Mettalia.)

period than that appearing on the face of these contracts?      A. No, there wasn't.

Q. Are you referring to the beginning of the period or the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947.

Q. Would there be any way that that policy, that policy period would be shortened?

A. Only by a cancellation notice or by endorsement, which must be acknowledged by the insured. That is the only two ways I know of, or if the policy is returned for cancellation.

Q. Were either of those two ways followed in this particular case?      A. Yes. [28]

Q. Which of the two?

A. We sent out cancellation notices.

Mr. Murman: Do you have those original notices, Mr. Eisner?

Mr. Eisner: Yes.

Mr. Murman: I think they were included in my demand.

Mr. Eisner: Yes, I have them.

Q. (By Mr. Murman): Mr. Mettalia, I show you what purports to be a cancellation notice dated December 19, 1946, addressed to California Motor Transport people, bearing all of the names on the reverse side, and referring to policy No. SPL-20968, and stating the cancellation takes effect on the 21st day of January, 1947, at 12:01 a.m. standard time. I ask you if that can be identified by you as the

(Testimony of Charles A. Mettalia.)

notice sent to the defendants in this case in connection with that particular policy.

A. That is correct. This is the notice.

Mr. Murman: I offer this in evidence as plaintiff's exhibit next in order.

The Court: No. 5.

(The cancellation notice was marked Plaintiff's Exhibit 5 in evidence.)

Q. (By Mr. Murman): I also show you, Mr. Mettalia, a similar notice, similarly dated, in all respects the same except for the policy number, SPL-20950, and ask you if you identify that as such a notice. [29]

A. That is correct.

Mr. Murman: I offer this in evidence as plaintiff's exhibit next in order, your Honor.

The Court: No. 6.

(The notice of cancellation was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Murman): Mr. Mettalia, in connection with the notices of cancellation you have just identified, was there a notice of cancellation filed with the Railroad Commission as to primary policy SPL-20968?

A. Yes, there was.

Q. I show you at this time what purports to be a copy of such a notice, referring to policy No. SPL-20968, and referring to the defendants in this case, and ask you if you can identify that as a copy of the notice which was filed?

A. That is correct.

Q. When you filed the original, it did not bear

(Testimony of Charles A. Mettalia.)

the stamp up there, up in the left-hand corner, did it?       A. No, it didn't.

Q. That was stamped on the copy at the time the filing was made?       A. That is correct.

Mr. Murman: Your Honor, it is stamped there, "Railroad Commission, State of California, December 20, 1946, Transportation Department, Truck and Stage Division." And the [30] notice on its face shows the cancellation to be effective as of the same date the notice is given, January 21, 1947. I offer this in evidence as plaintiff's exhibit next in order.

(The document was marked Plaintiff's Exhibit 7 in evidence.)

Q. (By Mr. Murman): Now, Mr. Mettalia, was there a cancellation given to the ICC?

A. Yes, there was.

Q. In what manner was that notice given?

A. We notified the home office to send out the insurance notice to the ICC.

Q. How was that notification given to the home office, do you remember?

A. I believe by wire.

Q. By wire? Did you receive back word that that cancellation had occurred?       A. Yes.

Mr. Murman: Do you have those?

Mr. Eisner: Yes, I have.

Q. (By Mr. Murman): At this time I show you, Mr. Mettalia, what purports to be copy of such wire and the original of such reply, referring to the



(Testimony of Charles A. Mettalia.)

cancellation of the filing with the ICC, and ask you if you identify those documents as purporting to be what I just referred to.

A. That is correct. [31]

Mr. Murman: At this time, if the Court please, I offer these two documents collectively as plaintiff's exhibit next in order, since they both apply to this same action.

(The documents were marked Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Murman): Now, Mr. Mettalia, your particular duties have to do with the knowledge of claims filed, do they? A. Yes, they do.

Q. Can you state whether or not any claims were filed by the defendants in this case under the policies or either of them which are now Plaintiff's Exhibits 3 and 4 in evidence, namely, SPL-20968 and SPL-20950, during the time elapsing between September 1, 1946, and January 21, 1947?

Mr. Eisner: Just a moment. We object to that as calling for a conclusion of the witness. The witness can testify as to whether or not claims were filed, and the claims will speak for themselves, but the statement as to whether or not the claim was filed under these policies or whether they were filed under a binder would call for a conclusion of the witness.

The Court: I think that objection is good.

Mr. Murman: I think that is correct, your Honor.

(Testimony of Charles A. Mettalia.)

The Court: Reform your question.

Mr. Murman: Yes, your Honor. [32]

Q. Mr. Mettalia, can you state whether or not any claims were filed with the plaintiff in this case during the time elapsing between September 1, 1946, and any date thereafter?

A. Yes, there have been.

Q. In this area, Mr. Mettalia, you have one office or more than one office with whom the defendants in this case would do business under these policies?

A. We have one office.

Q. One office? A. Yes.

Q. Where is that office?

A. 60 Sansome Street.

Q. Is there another office in the State of California?

A. Yes, we have several offices other than the one in this area.

Q. Where is that office?

A. We have one in Los Angeles, one in Fresno, one in Oakland, and one in Bakersfield.

Q. Do you know whether or not claims were received by those other offices? A. Yes. Yes.

Q. Claims that are received in the Los Angeles office, are they sent to San Francisco? A. No.

Q. Claims that are received in the Fresno office, are they [33] sent to San Francisco? A. No.

Q. Claims that are received in the Oakland office, are they sent—where are they sent?

A. The Oakland office.

(Testimony of Charles A. Mettalia.)

Q. Does San Francisco have any knowledge of those claims in Oakland? A. Yes.

Q. Does San Francisco have any knowledge of the claims filed in the other offices you mentioned?

A. Yes.

Q. Do you know, Mr. Mettalia, from your records as to how many claims were received by the company from the defendants in this case after September 1, 1946? A. Yes.

Q. How many? A. 98.

Q. 98. And do you know from the files of your office as to how much money was paid out on those claims? A. About \$7800, I believe.

Q. That is in round numbers? A. Yes.

Q. And those claims were all claims that arose after September 1, 1946, and were paid after that date, is that true? A. That is correct. [34]

Q. So far as you know, there are no further claims outstanding, is that correct.

A. That is correct.

The Court: We will take a five-minute recess.

(Recess.)

Q. (By Mr. Murman): Mr. Mettalia, I show you what purports to be claims filed with the plaintiff by the defendants in this case, and ask you whether or not you identify the documents which I have handed to you as such. A. That is correct.

Q. Are they all of the claims?

A. No, they are not. These are the claims that were submitted to our San Francisco office. Don't

(Testimony of Charles A. Mettalia.)

include the other claims offices that we have in this territory.

Q. Do you know what if anything happened to those other claims?

A. Yes, all other claims offices, they submit their reports to our home office. See, they are more or less field claims offices.

Q. But these were written in San Francisco and are being produced as a portion of the claims that were filed? A. That is correct.

Q. Over what period do those you have in your hand extend? When is the date of the first claim?

A. September 1, 1946. [35]

Q. What is the date of the last claim?

A. January 20, 1947. Do you want the last date of accident?

Q. Yes.

A. January 20, 1947. Then we have a report of claim——

Q. Is that an additional claim you are referring to now?

A. Yes. Then we have another date of accident, November, 1946, and that was reported December 4, 1947.

Q. Did you receive the report of that claim of accident which happened in November, 1946, in December, 1947? Is that correct?

A. That is correct.

Q. What happened to that claim?

A. This was a suit for \$15,000 and we defended

(Testimony of Charles A. Mettalia.)

it, and successfully, for the California Motor Transport.

Q. That was reported to you in December, 1947, is that correct?      A. Yes, sir.

Q. You then took the defense of it and successfully defended it, is that correct?

A. That is correct.

Q. You expended money in the defense, did you?

A. Yes, we did.

Q. There are vouchers attached there to that.

Do you have the total of those vouchers?

A. Yes. [36]

Q. What is the total amount expended?

A. \$1,671.77.

Q. That was paid by the plaintiff in the defense of the defendants' lawsuit as shown by that claim, is that correct?      A. That is correct.

Q. So that you got what we call a defendants' result there?      A. Yes, sir.

Mr. Murman: At this time, if the Court please, I offer in evidence collectively as plaintiff's exhibit next in order the claims filed, identified by the witness, and ask that they be so marked.

The Court: Very well.

(The claims were marked Plaintiff's Exhibit 9 in evidence.)

Mr. Murman: You may cross-examine.



(Testimony of Charles A. Mettalia.)

Cross-Examination

By Mr. Eisner:

Q. Mr. Mettalia, your company had been doing business with Bayly, Martin & Fay for a great many years, isn't that true—Fidelity and Casualty Company? A. I believe so; I am not sure.

Q. There was a policy that the California Motor Transport Company had from September 1, 1945, to September 1, 1946? A. That is correct.

Q. I am going to show you this policy No. 1457, and ask if you can identify it as the policy of the California Motor [37] Transport Company that was in existence from September 1, 1945, to September 1, 1946? A. That is correct.

Mr. Eisner: You are familiar with that, counsel?

Mr. Murman: Yes.

Mr. Eisner: We offer this policy in evidence as Defendants' exhibit.

Mr. Murman: To which we object as incompetent, irrelevant and immaterial, not binding upon the plaintiff, not within the issues of this case.

The Court: Overrule the objection. That is Exhibit A. How are you going to mark them?

The Clerk: I didn't think I would distinguish. I thought I would mark it just Defendants' Exhibit. You think it should be distinguished?

The Court: I think so.

The Clerk: This will be Defendants' Exhibit A.

(Testimony of Charles A. Mettalia.)

I will mark the third party defendant's exhibits with double letters.

(Policy No. SPL-1457 was marked Defendant's Exhibit A.)

Q. (By Mr. Eisner): It is the practice of the insurance company, prior to the time that a policy of an insured expires, to issue or get out a renewal policy so that it can be effective as of the date of expiration of the original policy, isn't that true?

A. Yes, that is correct? [38]

Q. Now, then, in this instance you began talking with Mr. Cantlen and Bayly, Martin & Fay sometime prior to September 1, 1946, that is to say, sometime in August? A. That is correct.

Q. Early in August, was it? A. Yes.

Q. You discussed with Mr. Cantlen the rate that should be applicable to the policy if renewed for another year; that is true? A. That is correct.

Q. And do I understand from you that prior to September 1, 1946, you came to an agreement with Mr. Cantlen that the rate for the renewal policy during the succeeding year would be \$2.20?

A. That is about right, yes.

Mr. St. Clair: What was that answer?

A. Yes.

Q. (By Mr. Eisner): In other words, prior to September 1, 1946, you had then—and I mean the Fidelity and Casualty Company—come to a definite agreement with Mr. Cantlen as to what the rate of

(Testimony of Charles A. Mettalia.)

premium would be for the policy during the succeeding year?

A. Subject to home office approval—subject to the approval of the National Bureau of Casualty and Surety Underwriters and submitting the return to the home office for [39] our formula.

Q. So far as Mr. Cantlen was concerned, he was satisfied that the rate during the succeeding year would be \$2.20, is that correct?

A. If it were approved by the National Bureau. In other words, we couldn't agree on any rate at all unless the Bureau so advised us to use that rate. We had assumed the National Bureau would go along on that rate.

Q. Yes. Well, then, to restate that, you had an agreement with Mr. Cantlen as to what the premium would be, which was \$2.20, subject to the approval of the National Bureau?

A. That is correct.

Q. After September 1, 1946, you had no further negotiations with Mr. Cantlen respecting the rate of premium upon this policy for the renewal during the succeeding year?      A. I didn't.

Q. Yes. I am restating your testimony.

A. Periodically Mr. Cantlen came in the office to see us.

Q. I understood you to say that so far as Mr. Cantlen was concerned, you had an agreement with Mr. Cantlen prior to September 1, 1946, that the rate upon this renewal would be \$2.20, subject to ap-

(Testimony of Charles A. Mettalia.)

proval of the National Bureau?

A. That is correct.

Q. I will ask you the question again: After September 1, did you have any further negotiations with Mr. Cantlen as to [40] what the rate would be during that succeeding year, September 1, 1946, to September 1, 1947? A. No.

Q. Very well. Now, then, Mr. Mettalia, in policy No. 20946, which has been introduced in evidence, you called attention, or your attention was called to the fact it provides for an annual audit?

Mr. Murman: May I interrupt? I don't think there is a 20946. I think you have the wrong number.

Mr. Eisner: Very well, that may be No. 20968.

A. Yes.

Q. I wish to make clear what those annual audits are. That annual audit was an audit that was made by the insurance company of the books of the insured as of the expiration of the insurance period in order that the insurance company could be sure that the insured had properly reported its gross earnings for the insured period, is that correct?

A. No, you are wrong.

Mr. Murman: I object to this on the ground that this witness would be giving his conclusion, as he is not in the auditing department, your Honor. He is in the underwriting department. I may say, we have a man from the auditing department and he will be produced as a witness and can testify from his own personal knowledge. Furthermore, the

(Testimony of Charles A. Mettalia.)

question is complex and compound and I don't understand it myself. But [41] this witness isn't capable of answering it.

The Court: I don't think the question is complex. It may be calling for his conclusion, but the man said "No," so I will allow it. He said "No."

Mr. Murman: I didn't hear the answer.

Q. (By Mr. Eisner): Do you know?

A. No.

Q. Do you know, Mr. Mettalia, the meaning of the provision of the policy that there shall be an audit by the company at the expiration of the insurance period in order to determine what the gross premium is?

A. It isn't—the audit isn't made for gross premiums alone. I think I know what you are trying to get me to explain.

Q. What is it made for?

A. A contract of this type, as we had it before, is a broad form liability policy, and it is based on certain exposures that are developed at the time we issue the contract. When an auditor goes to make an audit, the meaning of that audit is to pick up the payrolls, receipts, and any other exposures that the insured may have entertained during that period. If I may explain further, your Honor, by this I mean if he decides to buy a hotel, we pick up that exposure because he is automatically covered under the original contract. That is part of what the auditor does when he goes out to make that [42] audit, and that is in the provision of the contract.



(Testimony of Charles A. Mettalia.)

Q. Then the purpose is, Mr. Mettalia, to ascertain what are the gross receipts from any source of the insured to which the premium should be applied at the rate specified in the policy, is that correct?

A. That is correct.

Q. Now, then, Mr. Mettalia, this rate of premium, you say, was referred to the National Bureau?

A. That is correct.

Q. On September 19——

A. That is correct.

Q. ——1946? A. Yes.

Q. On August 27, 1946, did the Fidelity and Casualty Company issue a binder to the insured?

A. Yes, sir, we did.

Mr. Eisner: Can you produce a copy of the binder, please?

Mr. Murman: Yes, I can. We don't have the original. I understand the original was delivered to the assured, but we have a copy of it.

Mr. Eisner: Thank you. We can use a copy.

Q. I show you this photographic copy and ask you if you recognize it as the photographic copy of the binder that was issued to the California Motor Transport Company on August 27, 1947? [43]

A. That is correct.

Q. 1946, rather. A. That is correct.

Mr. Eisner: We offer this binder in evidence as defendants' exhibit next in order.

Mr. Murman: No objection.

Mr. St. Clair: No objection.

(Testimony of Charles A. Mettalia.)

(The binder was marked Defendants' Exhibit B in evidence.)

Q. (By Mr. Eisner): As I understand it now, Mr. Mettalia, you received an approval from the National Bureau, to which you referred this premium, about September 27, was it?

A. Approximately, yes, 27th or 28th; September 27 or 28.

Q. Then, Mr. Mettalia, it was after September 28 in 1946, as I understand it, that the policies, Plaintiff's Exhibits 3 and 4, were delivered to Mr. Cantlen? A. Yes.

Q. Approximately when were they delivered to Mr. Cantlen, according to your best recollection?

A. May I see the policies?

Q. Certainly. It is 20950.

A. I would say one of the policies was—let me see; that is about October 1, approximately October 1, maybe October 2. But that needs a little explanation, because I am basing it on the day we prepared these policies and was, in other words, the date the typist types these policies and then submits them [44] to us for review, and we don't have anything here to show the exact date, so I would say on or about the end of September or beginning of October.

Q. Now, then, at the time that you delivered those policies to Mr. Cantlen, did you at the same time deliver to Mr. Cantlen a retrospective agreement? A. Yes, I did.

(Testimony of Charles A. Mettalia.)

Mr. Eisner: I will ask counsel to produce this retrospective agreement.

Q. I show you this document and ask you if it is the retrospective agreement that you at the same time delivered to Mr. Cantlen. A. Yes, I did.

Mr. Eisner: We offer this document in evidence as defendants' exhibit next in order.

Mr. Murman: To which I object on the ground, may it please the Court, it was never executed by the defendants and therefore is not in the issues of this case.

The Court: Well, it may have some bearing on the issue that Mr. Eisner raised. I will admit it.

(The agreement was marked Defendants' Exhibit C in evidence.)

Q. (By Mr. Eisner): Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not? [45] A. I believe so.

Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?

A. No, absolutely not.

Q. Well, Mr. Mettalia, didn't you request Mr. Cantlen to have the insured sign the retrospective agreement? A. Yes.

Q. By the way, in order to make it clear, this retrospective agreement was an agreement whereby the amount of premium would either be raised to

(Testimony of Charles A. Mettalia.)

150 per cent or lowered to 50 per cent of its—of the agreed amount, dependent on the loss experience of the insured; is that correct?

A. Plus other factors, acquisition cost and production cost, and so on.

Q. Do I understand you to say you didn't ask Mr. Cantlen to have the insured sign this retrospective agreement?

A. No, I didn't say that, Mr. Eisner.

Q. What did you say to Mr. Cantlen when you gave him this retrospective agreement at the same time that you gave him these policies?

A. That we wanted to accept the policy on—we wanted that signed so that that would be part of the renewal policy. A retrospective rate basis is more or less to the advantage of the insured by signing such an agreement. Of course it [46] could be the other way, too.

Q. Could be the other way, too?

A. It is possible, yes.

Q. Isn't it a fact you asked Mr. Cantlen at the same time to have the insured sign this agreement?

A. Yes.

Q. You did? Now, then, Mr. Mettalia, this retrospective agreement was never signed, was it?

A. That is correct.

Q. Did Mr. Cantlen tell you that he submitted the retrospective agreement to the client, the insured? A. Yes.

Q. Did Mr. Cantlen tell you that the insured refused to sign the retrospective agreement?

(Testimony of Charles A. Mettalia.)

A. Yes.

Q. Was it after the insured refused to sign the retrospective agreement that the insurance was cancelled by Fidelity and Casualty Company?

A. Yes.

Q. Was the insurance cancelled at the request of the insured because the insured was not willing to take and sign the retrospective agreement?

A. What was that?

Q. Was the insurance cancelled at the request of the client, California Motor Transport Company? [47]

A. No.

Q. Because it wasn't willing to sign the retrospective agreement?

A. No.

Q. I show you Plaintiff's Exhibit 8, and I call your attention to this language, which is a telegram dated December 19, 1946, from C. A. Mettalia, Superintendent, Casualty Department, Fidelity and Casualty Company of New York, to Mr. Frank G. Haley, Superintendent, Automobile Department, Fidelity and Casualty Company of New York, "California Motor Transport SPL-20950 and 20968. Request home office send cancellation notice to ICC effective January 21 stop Insured refused to sign retrospective agreement."

A. Yes.

Q. Was the reason for the cancellation that the insured refused to sign the retrospective agreement?

A. You didn't finish that wire, did you?

Q. I will read the rest of it: "Fidelity bonds were not renewed with us as originally agreed Stop



(Testimony of Charles A. Mettalia.)

Railroad Commission notice will be sent from this office." A. Yes.

Q. I will ask you again if the reason for the cancellation was that the insured refused to sign the retrospective agreement. A. Yes. [48]

Q. That was the reason, wasn't it?

A. Partly the reason.

Q. All right. What did you refer to when you said, "Fidelity bonds were not renewed with us as originally agreed?"

A. When this risk, when he was told on what basis we would write the entire account at, we had used a rate we would accept based on all our overall volume of business from the insured. We had hoped that the Bureau would go along with us in using that rate. Normally the Bureau would go along and accept that rate, particularly because of the rate, the tremendous rate increase prior to September 1, 1946. In our negotiations we negotiated that way.

Q. As I understand it, then, the meaning of that language is that the Fidelity and Casualty Company had hoped to receive the bond business from the insured, is that right?

A. In other words, we had hoped to get out of the red. We had lost.

Q. Did the fact that you did not receive the bond business have anything to do with the cancellation?

A. Yes, partly.

Q. Then the joint reasons for the cancellation was the fact that the retroactive agreement was not

(Testimony of Charles A. Mettalia.)

signed by the insured, and that you had not received the Fidelity business from the insured?

A. That is another reason. [49]

Q. Two reasons. Now, then, Mr. Mettalia, your answer—excuse me. The complaint in this case states that the policies were issued, made, executed and issued on or about September 1, 1946, is that correct?

A. The policies were?

Q. Yes.

A. Binders were issued, which is the same as a policy.

Q. Just a moment. A binder was issued on August 27, 1946?

A. That is correct.

Q. Then on about October 1, 1946, you say you delivered these policies to Mr. Cantlen?

A. Yes, that is correct.

Q. I am asking you if it is a fact that these policies were issued on or about September 1, 1946.

Mr. Murman: To which I object on the ground that the policies are the best evidence of what dates they cover and the period of time in which the insurance was in force and when they were issued.

The Court: What is the date of the policy?

The Witness: September 1, your Honor.

Mr. Murman: Would your Honor wish to see them?

The Court: No.

Mr. Murman: The dates are September 1 in each case, your Honor. The policy period of September 1, 1946, at 12:01 o'clock is stated on the policy. [50]

The Court: Well, I feel that they are quite

(Testimony of Charles A. Mettalia.)

clear, that they may not have been actually signed on that date, but they were intended to relate back to September 1, 1946.

Q. (By Mr. Eisner): Well, one thing I want to make clear, Mr. Mettalia, by whom was this binder signed?

A. One of our employees. This is a copy of the original binder.

Q. This does not bear the signature?

A. No.

Q. Was that binder delivered to Bayly, Martin & Fay? A. Yes.

Q. The original of it?

A. I assume that it was.

Mr. Eisner: I just want to call the Court's attention to the fact that this binder—I think we should do that at this time—that it says, the binder, "Pending renewal of Policy No. SPL-1457."

A. That is correct.

Q. And it is dated August 27, 1946?

A. Yes.

Mr. Murman: I think you should read the language in the latter part there, Mr. Eisner.

Mr. Eisner: You can, if you wish.

Mr. Murman: I mean, that is, I think, in connection with the point you are making and should be before the Court [51] if there is going to be any point made.

Mr. Eisner: I won't read the entire binder at this time.

(Testimony of Charles A. Mettalia.)

Mr. Murman: May I at this time read that last paragraph, then? Do you mind?

Mr. Eisner: I will read it, if you want it.

“If the company accepts the risk, the policy issued shall supersede this binder, and the policy term shall begin on the binder date. If the risk is not accepted, this binder may run to expiration, or the company may cancel by mailing notice to the insured and to the broker (or agent) upon whose application it was issued. A premium charge at the rates and in compliance with the Rules of the Manual of Rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured. Not valid unless duly signed.”

Mr. Murman: Thank you.

Q. (By Mr. Eisner): This is a bona fide printed form of binder used by the insurance company?

A. It was a common binder and just like the policy.

Q. It is a printed form of binder that is filled in? A. Yes.

Mr. Murman: The binder speaks for itself, your Honor. [52]

Mr. Eisner: It does speak for itself.

Q. Now, Mr. Mettalia, was there any notice ever given of the cancellation of that binder?

A. Was there any notice?

(Testimony of Charles A. Mettalia.)

Q. Yes, any notice ever given to the insured of the cancellation of that binder.

Mr. Murman: That is incompetent, irrelevant and immaterial, since the binder provides on its face it will be superseded by the policy issued, and that binder is not issued if the policy is issued.

Mr. Eisner: Just a moment. Our thought is that the binder was never superseded by a policy and the policy never became effective.

The Court: I understand the point. I will let him answer the question.

A. Was notice sent to the insured, is that what you asked?

Q. (By Mr. Eisner): Yes, cancelling the binder.

A. No.

Q. Mr. Mettalia, policies 20968 and 20950 provide for a deposit premium to be paid, do they not?

A. Yes.

Q. And the deposit premium was to be paid at the time the policies became effective?

A. Not necessarily, no.

Q. Well, all of your policies that the insured had provided [53] for deposit premiums, did they not? A. I don't know.

Q. Well,—

A. Policies of our company had deposit premiums, yes.

Q. And the Fidelity and Deposit Company has requested payment by the California Motor Transport Company of a deposit premium?



(Testimony of Charles A. Mettalia.)

A. You mean the Fidelity and Casualty Company?

Q. Yes.           A. I don't know.

Q. Did you ever request payment from Mr. Cantlen or Bayly, Martin & Fay?

A. That isn't in my department.

Q. Well, do you know whether or not any payment of deposit premium was ever made?

A. I imagine so. I don't know.

Q. Well, will you look to see whether or not any deposit premium was ever paid under that policy?

A. That would be up to another man in our department. I am not the cashier.

Q. Now, then, did Bayly, Martin & Fay collect the premium for Fidelity and Casualty Company?

A. I don't know.

Mr. St. Clair: Just a minute. I object to that on the ground that it calls for a conclusion of the witness, the way [54] the question is framed. It is a conclusion as to whether they collected it "for." That implies a relationship that has not been shown in the evidence, or, in fact, expressly denied that there was any relationship.

The Court: You can reframe it.

Q. (By Mr. Eisner): Who collected the premiums from the insured under the policy?

Mr. St. Clair: If he knows.

A. Who collected the premiums?

Q. (By Mr. Eisner): Yes.

A. I don't know who collected the premiums.

(Testimony of Charles A. Mettalia.)

Q. From whom did the insurance company, Fidelity and Casualty, receive the premiums under the policy?

Mr. Murman: Now, if the Court please, this is calling for a conclusion of the witness. He is not in the cashier's department, he is in the automobile department. We have persons here from the company who will testify to those activities. He is not competent to answer the questions.

The Court: If he isn't competent he can say he doesn't know. After all, if he knows who received the premiums and from whom they received them, he can say so, and if he doesn't know he can state that.

Mr. Murman: Yes, your Honor.

Q. (By Mr. Eisner): Can you answer, Mr. Mettalia? A. Bayly, Martin & Fay. [55]

Q. And Bayly, Martin & Fay then collected the premiums from the insured and remitted them to the Fidelity and Casualty Company?

A. I believe so.

Q. Now, Mr. Mettalia, it is stated in the answer that the insured remitted monthly premiums payments to the plaintiff—in the complaint, I should say. A. Yes.

Mr. Eisner: I will ask counsel to produce, if he will, please, Mr. St. Clair, the remittances and reports.

Mr. Murman: I think you demanded I produce them. I have copies of them which I am quite willing you should have.

(Testimony of Charles A. Mettalia.)

Mr. Eisner: Very well.

Mr. Murman: I don't have the covering memos on them, just have the copies.

Q. (By Mr. Eisner): Mr. Mettalia, did you receive monthly from the insured, as alleged in this complaint, the reports of monthly receipts and remittance of premium as stated in the complaint?

A. Yes.

Q. Do you have the reports that were received from the insured and the remittances, or were they sent to Bayly, Martin & Fay?

A. I don't know.

Q. Now, Mr. Mettalia, are you personally familiar with the [56] reports that were made by the California Motor Transport Company——

A. No, I am not.

Q. ——to Bayly, Martin & Fay?

A. No, I am not.

Q. Are you personally familiar with the reports that were made and remittances made by Bayly, Martin & Fay to Fidelity and Casualty Company?

A. No, I am not.

Q. In other words, after this insurance—after these policies were delivered did you have anything to do——

A. Yes.

Q. ——with these policies?

A. Yes, definitely.

Q. Did you receive or examine any of the reports that were made or premium from Bayly, Martin & Fay?

A. No, I didn't.

Q. Who in your department did receive these?

A. Our audit department.

(Testimony of Charles A. Mettalia.)

Q. Did you make any inquiry to find out whether or not, after September 1, 1946, premiums were being reported and paid by the California Motor Transport Company?

A. Our company is such that we don't need that through that particular channel. In other words, I get a periodic review, usually semi-annually, to value a risk of this size, both for [57] premium, income, resources, and anything that may be outstanding with our engineering staff, and so on.

Q. Then you are not familiar with the reports that were made by Bayly, Martin & Fay?

A. No.

Q. Did you make any inquiry to find out whether or not the deposit premium was paid that the policies called for?                      A. No.

Q. Do I understand you to say that Mr. Cantlen accepted these policies, 20950 and 20968, on or about October 1, 1946?                      A. Approximately that date.

Q. Did you ask Mr. Cantlen thereafter for this retrospective agreement?                      A. Yes.

Q. Why did you ask him for the retrospective agreement?                      A. Why did I ask him?

Q. Yes.

A. So that we could get it executed and give the insured his copies, and so on.

Q. Now, in this telegram, Mr. Mettalia, and your testimony, you say you cancelled the insurance because the insured did not sign the retrospective agreement?

A. That is part of the telegram, sir.

Q. Now, do you mean to say, then, that these

(Testimony of Charles A. Mettalia.)

policies were in effect without the signing of this retrospective agreement? [58]

A. Absolutely, yes, sir.

Q. Did you so tell Mr. Cantlen? A. Yes.

Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?

A. Not only did Mr. Cantlen accept them, but the insured accepted them.

Q. Why do you say the insured accepted them?

A. Because there is an ICC and Railroad Commission filing. If he didn't accept them, he couldn't operate and the ICC and Railroad Commission file would have immediately pulled him off the road.

Q. Regarding these filings, these filings were filed about August 27, 1946, were they not?

A. That is correct, they were.

Q. And they were filed before you had an agreement with Mr. Cantlen upon the rate that would prevail during the succeeding year, is that it?

A. I don't know if that is correct. I am not sure.

Q. They were filed prior to the time that you say you had the approval from the National Bureau? A. That is correct, yes, sir.

Q. They were filed at a time when the binder had been issued to the insured extending 1457, is that correct?

A. Yes. Can I add a little to that? [59]

Q. Yes.

A. When binders are issued we automatically add those assigned policy numbers to satisfy the



(Testimony of Charles A. Mettalia.)

ICC and the Railroad Commission. They do not accept them otherwise. If it isn't satisfactory to the ICC file, they are fined \$30 gross on that particular file.

Q. In other words, in order to satisfy the ICC and Railroad Commission there had to be a certificate upon the file that the insured was covered by the insurance company that was an approved company, is that correct?

A. That is correct, yes, sir.

Q. And in order to satisfy that requirement, on or about August 27, 1946, you made this filing with the Railroad Commission and the ICC and gave the filing that would refer to the number on the policy, is that it?

A. That is correct, yes.

Q. Thereafter you referred the rate to the National Bureau, is that correct?

A. That is correct.

Q. And agreed with the rate with Mr. Cantlen?

A. That is correct.

Q. Now, you stated claims were filed by the insured after September 1, 1946?

A. Yes, sir. As a matter of fact, on September 1, 1946.

Q. These claims were filed on certain forms, were they not? [60]

A. Yes, sir.

Q. In other words, the insured had a form of report blank, is that correct, upon which he would make these returns?

A. Yes.

Q. I show you one of these forms from Exhibit

(Testimony of Charles A. Mettalia.)

No. 9 and ask you if that is typical of all of the reports of claims that were made by the insured following September 1, 1946.      A. Yes.

Q. I call your attention to the fact that upon this return of notice of claim there is no reference to any policy number or any policy whatsoever.

A. That is typical of any claims report.

Q. In other words, upon these reports that were made by the insured, and upon all of them, there was no policy number designated by the insured in the space that was left for policy number in this form of claim?      A. No.

Mr. Murman: That is objected to as assuming something not in evidence. You asked if that was typical. Now you said it is on all of them.

Mr. Eisner: I will ask this question:

Q. So far as you know——      A. Yes.

Q. ——upon all of the claims forms that were reported by the insured after September 1, 1946, were those claims in the form [61] that I am showing you at this time from this exhibit?

A. No.

Q. In what way did they differ?

A. Some may have policy numbers.

Q. So far as you know do any of them have the policy number?      A. Yes.

Mr. Murman: The claim is the best evidence.

Q. (By Mr. Eisner): Can you see on any of these policies where the policy number is upon the form of claim that is presented by the insured?

A. (Examining documents): Well, there are a

(Testimony of Charles A. Mettalia.)

few with the policy number written in pencil. However, I assume from that, if I may, that that would be from our index file. When they get a claim they would have to allocate that claim to a particular policy. My answer is that most all accident reports come in that way.

Q. I am not asking you about all of them, I am asking about reports made——

A. There are pencil notations put in there, and I don't know whether that was put in by the insured or by the broker or our own cashier. You will notice there are some with the SPL-29058, or whatever it is.

Q. Now, Mr. Mettalia, these claims are type-written, are they not, that are presented by the insured? A. Yes. [62]

Q. And on a number of the claims that were presented, then, as I understand your first testimony, there was no policy number at all?

A. That is correct.

Q. And on some others you find the policy number filled in in pencil? A. That is correct.

Q. As I understand you, you don't know who filled in that in pencil? A. No, I wouldn't.

Q. You don't recognize the writing?

A. No.

Q. Or the figures. During this period there were 98 claims presented, as I understand?

A. That is correct.

The Court: It is twelve o'clock. We will adjourn until two o'clock.

(Testimony of Charles A. Mettalia.)

(Thereupon a recess was taken until 2:00 p.m. this date.) [63]

Friday, September 30, 1949

CHARLES A. METTALIA

resumed.

Cross-Examination  
(Continued)

By Mr. Eisner:

Q. Mr. Mettalia, I call your attention to special endorsement No. 8 on Plaintiff's Exhibit 4, which is one of the policies, and call your attention to this language: "Premium determination, owned and non-owned automobiles. Division No. 1—Retrospective rating plan—Limits \$10/20,000." I will ask you if the words "retrospective rating plan" upon that endorsement refer to the retrospective agreement which was delivered by you to Mr. Cantlen simultaneously with that policy.

The Court: Which exhibit number is that?

The Witness: Exhibit 4. This is the primary policy?

The Court: No, it isn't.

The Witness: This is the accident policy. Possibly so, yes.

Q. (By Mr. Eisner): Well, does it or doesn't it, Mr. Mettalia? A. Sure.

Q. The words "retrospective rating plan" on endorsement 8 to this policy, which refers to the pri-

(Testimony of Charles A. Mettalia.)

mary rating, states that a retrospective rating plan is applicable, doesn't it?

A. No, it does not. It just says, "Premium determination, [64] owned and non-owned automobiles, Division No. 1—Retrospective rating plan—Limits ten thousand, twenty thousand and five"—

Q. Retrospective—

A. Wait and let me finish. Estimated annual gross earnings, \$1,500,000. Rate per \$100 of gross earnings, \$2. Estimated annual premium, \$30,000. But then it goes on and breaks it down, the Division No. 2, Excess Limits. In other words, the purpose of this endorsement is that your excess limit is a guaranteed limit on the guaranteed rate. It had to be broken down into this endorsement to show the retrospective rate, that is, the rate of \$2, subject to the signing of the agreement.

Q. In other words, the retrospective rating plan which has reference to Division 1 has reference to the speculative agreement of the same date, has it not?

A. The premium.

Q. Yes. I mean, the retrospective arrangement or plan mentioned here has reference to the retrospective agreement which is dated September 1, 1946, the same date as the policy; that is true, isn't it?

A. Yes.

Q. Is it a fact that this endorsement, Retrospective Rating Plan, was upon this policy at the time you delivered it to Mr. Cantlen?

A. I assume that all these endorsements were attached to the [65] policy.



(Testimony of Charles A. Mettalia.)

Q. The fact is that this endorsement that had application to the retrospective rating plan on Division 1 was upon the policy at the time it was delivered? A. On SPL-20950.

Q. Now, Mr. Mettalia, I call your attention to this language of the retrospective agreement, which is Defendants' Exhibit C: "Whereas, at the special instance and request of the insured and upon the security of this agreement, the company is about to issue to the insured the following policy: Automobile Liability Policy No. SPL-20968." This policy No. SPL-20968 referred to in the retrospective agreement is the same policy numbered SPL-20968 which is the Plaintiff's Exhibit 3 in this case, is that correct? A. I believe so.

Q. Mr. Mettalia, you stated that the total claims paid after September 1, 1946, amounted to \$7800?

A. Approximately.

Q. Well, those are your figures, are they not?

A. That is correct, sir.

Q. So far as you know, are they correct?

A. I said approximately \$7800.

Q. That included claims that were sent to all places, not only San Francisco but to all of the offices of the company?

A. That is correct, wherever the accident occurred. [66]

Q. Did that figure \$7800 also include the \$1,-671.77 which you say was paid out by the company as expense in connection with the defense of a lawsuit which resulted favorably to the insured?

(Testimony of Charles A. Mettalia.)

A. I believe so.

Q. So that, then, \$7800 is the total of expense of the company from and after September 1, 1946, in connection with this risk? A. Yes, sir.

Q. And the company has received, you testified, the premium reported by the insured from and after September 1, 1946, the sum of \$9,131.13, is that correct? A. I didn't testify to that, sir.

Q. Well, do you know how much the company has received in premiums that were received by the insured in that—— A. No, I don't.

Q. ——from and after September 1, 1946?

A. No, I don't.

Q. Do you know that that is the amount set forth in your report?

Mr. Murman: That is immaterial.

A. No.

Q. (By Mr. Eisner): Mr. Mettalia, you stated that you delivered these policies No. SPL-20968 and -20950 to Mr. Cantlen, together with the retrospective agreement, on or about October [67] 1. Did you ever ask Mr. Cantlen whether or not he would deliver—whether or not he had delivered either one of these policies to the insured?

A. No, I didn't.

Q. Did Mr. Cantlen ever tell you he had not delivered either policy to the insured?

A. Several months later.

Q. When did Mr. Cantlen tell you first, for the first time, he had never delivered either one of those policies to the insured?

(Testimony of Charles A. Mettalia.)

A. I don't recall ever hearing that statement from Mr. Cantlen.

Q. You said it was told you several months later. Who told you?

A. Several months later when we demanded the retrospective rating agreement to be signed, Mr. Cantlen said that the insured was not in agreement with the—that is, wasn't willing to sign the agreement, and whether or not we could work up or revise or write up a new program, something like that. I don't recall the exact words.

Q. To get this clear, when you say "a few months later" you mean after September 1, 1946?

A. Oh, yes, possibly November.

Q. You demanded of Mr. Cantlen the signing of the retrospective agreement? [68]

A. Yes.

Q. That is correct?

A. That is correct.

Q. And Mr. Cantlen then told you he couldn't get the retrospective agreement signed, is that true?

A. That is correct.

Q. Did Mr. Cantlen then tell you that he had retained the policies No. SPL-20950 and -20968 in his possession?

A. No, I don't remember that.

Q. What did you mean when you said you learned a few months later Mr. Cantlen had not delivered the policy to the insured?

A. No, I hadn't even finished my answer when you interrupted me.

Q. I am sorry.

A. I repeat what I just mentioned a few minutes

(Testimony of Charles A. Mettalia.)

ago, that several months later Mr. Cantlen, when I approached him on signing the agreement, said that the insured would not sign the agreement, that he felt the rate was too high, something like that, and whether or not we could work up a program on a guaranteed cost basis.

Q. What did you tell Mr. Cantlen then? That you could not?

A. That I would try to work up some guaranteed cost basis, but certainly under no conditions would the rate of \$2 be acceptable as a guaranteed cost policy, bearing in mind that there was a percentage of increase in the entire industry, [69] that is, the automobile business in this State, of approximately 33 per cent, and that if it did go on a guaranteed cost basis it would be in excess of \$2.

Q. In other words, if you did agree on a \$2 rate, there would have to be a retrospective arrangement whereby the ultimate premium would be based on the insurance experience; is that right?

Mr. Murman: That isn't this situation at all.

Q. (By Mr. Eisner): Is that what you mean?

A. More or less that. When you work up a standard premium—bearing in mind that when we work up something that we submit to the Bureau, they are always subject to approval. When we work up a standard premium, that premium is based on more or less a true manual basis for a normal type of classification, normal type of automobile or normal type of any classification that you may insure. When there is something of an un-

(Testimony of Charles A. Mettalia.)

usual exposure, then you work up a program two ways, with a maximum and a minimum, more or less to protect, one, the insured on a guaranteed basis in the event they had losses going in excess of a certain amount, and, two, as a program of successive and possible rate reduction.

Q. That is, what you are just stating, with a possible increase and possible reduction, that has reference to the retrospective rating plan?

A. That is right. You will break it up. [70]

Q. Was that tendered to Mr. Cantlen?

A. Yes.

Q. Mr. Cantlen told you the insured would not agree to that, didn't he? A. That is correct.

Q. Mr. Cantlen told you that the rate was too high, that the insured would not accept such rate, is that it?

A. That is right. He was referring to the maximum.

Q. Then he asked you if you could renegotiate and get something that might be acceptable to the insured? A. That is correct.

Q. Did you have anything else to offer Mr. Cantlen, any different rate than had been submitted?

A. I don't recall, no. We were going to negotiate with the home office, and finally they decided to send out cancellation notices.

Q. In other words, after your conversation with Mr. Cantlen in which he told you, as you stated, that the rate was too high and the client would not agree, you took it up with the home office?



(Testimony of Charles A. Mettalia.)

A. What rate are you referring to? The \$2 or the retrospective plan?

Q. You told me Mr. Cantlen told you that the rate was too high, and that the——

A. The retrospective rating agreement as a whole. In other [71] words, the one, two and three dollar rate. When we did negotiate and talk about a policy, we were talking about the retrospective. Those were the rates. It isn't rates that we were talking about.

Q. From the time of your original negotiations with Mr. Cantlen in the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjustable according to the loss experience of the insured?

A. That is correct.

Q. And your conversations with Mr. Cantlen during the month of August, then, and at all times, were based upon a premium that would be ultimately figured upon a rate that would ultimately be determined according to the loss experience of the insured?

A. Correct, providing the insured did agree to it, or providing he would go along on the retrospective agreement.

Q. When you submitted the policies to Mr. Cantlen, you gave to him at the same time the retrospective agreement and the policies?

A. That is correct.

Q. And the policies referred to the retrospective

(Testimony of Charles A. Mettalia.)

agreement and the retrospective agreement vice versa?

A. No, you are wrong. The only thing the policy refers to on the retrospective agreement is the excess policy, so that the excess policy is on a guaranteed cost basis. That is, the [72] policy, the original primary policy does not mention retrospective.

Q. Oh, of course the retrospective rating is set forth in this endorsement to the policy, Mr. Mettalia?

A. This is the excess policy, as regards the automobile portion of this contract primarily. The retrospective rating plan in here, which is Division 1, with our limited standard plan, would be applicable to the ten, twenty, five limit, and the excess limit under Division 2 would apply on a guaranteed cost basis.

Q. I understand that. See if I am correct? On the 20-cent rate the retrospective plan was not applicable?

A. That is correct.

Q. In other words, that was devoted to the guaranteed rate. But on the primary rate, the rate that covered ten to twenty thousand insurance, beyond that the retrospective rating plan was applicable, is that correct?

A. No, it isn't correct. The agreements weren't signed and this rate is only the standard rate, which is a manual rate.

Q. Doesn't the other retrospective rating plan which is referred to, the ten thousand, twenty

(Testimony of Charles A. Mettalia.)

thousand limit, have reference to the retrospective rating plan referred to in this agreement, which is Defendant's Exhibit C?

A. I fail to see where that endorsement refers to that plan.

Q. Was there any other retrospective rating plan that you had [73] spoken of to Mr. Cantlen in your negotiations other than the retrospective rating plan that is set forth in the agreement that you submitted to him and which is Defendant's Exhibit C?

A. No.

Mr. Eisner: I think that is all.

### Cross-Examination

By Mr. St. Clair:

Q. I would like to ask Mr. Mettalia a few questions, your Honor.

Q. Mr. Mettalia, when did you come to the San Francisco office?      A. November 3, 1945.

Q. Did you immediately assume the position of superintendent of casualty?      A. No, I didn't.

Q. Or whatever it is?

A. Casualty superintendent. No, sir.

Q. When did you assume that position?

A. On or about the last week of March, 1946. That was the official date.

Q. Who had preceded you in that position?

A. Maurice Witt.

Q. Did he stay with the company after that?

A. Yes, he did. He is now in our New York office.

(Testimony of Charles A. Mettalia.)

Q. Who is Mr. O'Malley?

A. He was our agency supervisor. [74]

Q. Is he still with the company?

A. No, sir.

Q. Do you know his initials?

A. John O'Malley. I think it is 'John O. No, I don't remember his middle initial. It is John.

Q. Who is Mr. F. L. Anderson?

A. He was our resident manager until January of 1949.

Q. But during the time we are talking about now, was he resident manager? A. Yes.

Q. Does that mean chief executive of the company here in San Francisco? A. Yes, sir.

Q. In the normal routines of your company's business, would letters concerning claims, or, rather, concerning casualty matters that were addressed to Mr. Anderson come to your attention eventually?

A. Yes, sir.

Q. Mr. Mettalia, I show you what purports to be a carbon of correspondence dated July 22, 1946, addressed "Fidelity and Casualty Company, 60 Sansome Street, San Francisco, California, Attention Mr. F. L. Anderson," and ask you if you have seen the original of that letter, or do you know whether it was received by your company?

A. Yes, it was, sir. [75]

Mr. St. Clair: I had intended to offer this for identification, but I will offer it in evidence, your Honor, as 'Third Party Defendants' Exhibit, which would be, I take it——

(Testimony of Charles A. Mettalia.)

The Clerk: Third Party Defendants' Exhibit AA.

Mr. Murman: Are you going to put in the answer to that, too?

Mr. St. Clair: Yes.

Mr. Murman: All right. No objection.

(Letter dated July 22, 1946, to Fidelity and Casualty Company was marked Third Party Defendants' Exhibit AA.)

Q. (By Mr. St. Clair): Mr. Mettalia, was the information requested in that letter prepared?

A. I think it was, I am not sure.

Q. Now, I ask you if that letter served to remind you of any conference that you had with Mr. Cantlen before July 31, 1946?

A. Well, it must have been maybe afterwards. I was in New York until July 28, 1946.

Q. All right. I am not trying to——

A. I don't remember.

Q. Let me show you a letter on the letterhead of the Fidelity and Casualty Company of New York, dated July 31, 1946, purporting to be signed by you, and ask you if that is signed by you.

A. Yes, that was just about the time I arrived.

Mr. St. Clair: We offer the letter as identified by the witness as Third Party Defendants' Exhibit BB. [76]

(The letter was marked Third Party Defendants' Exhibit BB in evidence.)



(Testimony of Charles A. Mettalia.)

The Court: To whom is that addressed?

Mr. St. Clair: To Bayly, Martin & Fay, on Fidelity and Casualty Company letterhead, signed by Mr. Mettalia.

The Witness: That is correct.

Q. (By Mr. St. Clair): I show you, Mr. Mettalia, what purports to be the carbon of a letter addressed to the Fidelity and Casualty Company, signed by Mr. Cantlen on behalf of Bayly, Martin & Fay, dated August 5, 1946, and ask you if you have seen the original of that letter, or was it received by you? A. I believe it was.

Mr. St. Clair: We offer the letter, as identified by the witness, as Third Party Defendants' Exhibit CC.

(The letter was marked Third Party Defendant's Exhibit CC in evidence.)

Q. (By Mr. St. Clair): With these three letters to refresh your memory, Mr. Mettalia, I would like to ask you if you recall an occasion prior to July 31, 1946, at the office of Mr. O'Malley, whom you just identified, where you were called into the office and Mr. Cantlen was there.

A. Yes. As a matter of fact, that conference originated from a letter that I had sent while I was in New York. I had sent a letter, a little pencil memo, so I remember that very [77] well.

Q. That was prior to July 31, wasn't it?

A. About that, yes, I would say.

Q. Would you refer to your letter of July 31?

(Testimony of Charles A. Mettalia.)

Wasn't that letter of July 31 written as a result of that conference?       A. Oh, yes, yes.

Q. And referring to your letter of July 31 and to Mr. Cantlen's letter of August 5, I ask you if that refreshes your memory as to another conference held in Mr. O'Malley's office, at which you were there, as was also Mr. Cantlen?

Mr. Murman: You mean subsequently?

Mr. St. Clair: Subsequent to August 5. If it would help Mr. Mettalia's recollection, I would suggest the date of August 15 as the possible date of the second conference.

A. I would say it was. I am not certain, but I know that we had several conferences.

Q. You would not say there wasn't such?

A. Oh, absolutely not; I remember that perfectly.

Q. Referring to the conference that possibly was on August 15, do you recall a claim known as the Peralta case in which there was a large reserve, \$16,000, set up by your company?       A. Yes, sir.

Q. Do you recall a conversation concerning that particular reserve on or about August 15 in which that—Do you recall calling the claims man with regard to that particular reserve, [78] discuss as to whether it should be lowered to \$8,000, the reserve. I mean?

Mr. Murman: Is that SPL-1457?

A. That is on the previous, 1945 to 1946 period?

Mr. St. Clair: I assume so.

Q. I am just asking you, Do you recall the con-

(Testimony of Charles A. Mettalia.)

versation?           A. No, I really don't.

Q. You don't. Now, let me ask you this: Are you familiar with the names of the companies that belong to this Bureau, whatever it was, that you referred to?           A. I can name many of them.

Q. May I ask you, could you, if I gave you some companies, tell me whether they were members or not?           A. Yes, sir.

Q. A company called Continental Casualty?

A. I believe so.

Q. Travelers Insurance?           A. Yes, sir.

Q. Royal Indemnity?           A. Yes, sir.

Q. Great American Insurance Company?

A. Yes, sir.

Q. Pacific Indemnity?

A. I think they are subscribers, sir.

Q. And Pacific Employers? [79]

A. They are also subscribers.

Q. Thank you.

A. There's many more of them.

Q. Now, I would like to ask you, reference to a date of about September 23 and I present you with Plaintiff's Exhibit 4—could have been 3, either. Perhaps that will help you refresh your memory as to a conference, and I would like to ask if you remember a conference in your office with Mr. Cantlen on or about September 23 with regard to the guaranteed rate basis. I believe it was probably the other you testified to a few minutes ago. He came in and asked you for a guaranteed rate?

A. Yes.

(Testimony of Charles A. Mettalia.)

Q. Who was there besides yourself and Mr. Cantlen?

A. I don't think there was anyone else there but Mr. Cantlen and I. I am not sure, though.

Q. And at that time, on February—pardon me; September 23, had the proposed retrospective agreement been drawn?

A. I wouldn't know. I don't know.

Q. It is dated—withdraw that. Looking at that policy which you have in your hand, is there anything you can tell us of the date it was drawn?

A. The policy was typed on September 24, 1946.

Q. I hand you Defendants' Exhibit C, which is the retrospective agreement, and ask you if there is anything you can tell me [80] about the date that was drawn? A. No, sir.

Q. Do you have any way of telling from your files?

A. Not from what we have here now. I don't know.

Q. Could you tell from your files that are not here, that are in your office?

A. I don't know if there are any other files in our office.

Mr. Murman: Mr. St. Clair, isn't there a signature on that?

Mr. St. Clair: There is, indeed, Mr. Murman.

A. If I remember right, Mr. St. Clair, there was originally an error in these agreements, some typographical error, or something of the kind. If I remember right, they were sent back to our home

(Testimony of Charles A. Mettalia.)

office for correction, and to expedite it, expedite the execution of these agreements, I requested that our secretary sign them rather than have the insured sign them first and send them back to New York for the signature. I don't remember how much of a delay there may have been, but maybe a week, two weeks, maybe a month, but I do remember something now that, as to Mr. Robinson's signature, that it indicated to me there was some form of error and it was sent back there to correct it, and I had him sign them rather than sending them out here unsigned, then send them back to New York for signature once again.

Q. Going back to the conference of August 15 at which you and [81] Mr. O'Malley and Mr. Cantlen were present, around August 15, the one I referred to a moment ago when I asked if you recalled the Peralta case—— A. Yes.

Q. At that time and later the plaintiff, Fidelity and Casualty Company, was willing to write this insurance and told Mr. Cantlen?

A. I think so, tentatively, of course.

Q. Do you recall whether they were or not?

A. Yes, I think so.

Q. Would you be willing to say that they were? Or let me put it the other way: Would you say that they were not?

A. This was the second conference?

Q. This was the second conference, yes, sir.

A. I would say we would have a tentative rate from our home office and——



(Testimony of Charles A. Mettalia.)

Q. Let me ask you this, Mr. Mettalia: Have you a picture in your mind of that conference? I am going to ask you something then about the physical end. Have you it physically in mind; the conference? A. Yes.

Q. Do you recall whether or not notes were taken by Mr. Cantlen as to these rates that you were offering?

A. Yes, I think he worked up a work sheet that day.

Q. You have a recollection of that? [82]

A. That is correct.

Q. It would be your present testimony that Mr. Cantlen took that work sheet away with him?

A. I think so.

Q. Now, in that conversation of August 15 in which Mr. Cantlen took away the work sheet, at that time these three rates, \$1, \$2, and \$3 rates, were talked about? A. Yes.

Q. And they were told to Mr. Cantlen?

A. They would have to be, otherwise we couldn't work up the work sheet. I remember we worked that way. We couldn't use that work sheet unless we had that rate.

Q. Then whenever the policies were drawn up physically, and whenever the agreement, the retrospective agreement, was drawn up, were they drawn up exactly in conformity with that original conference of October 15? A. Yes.

Q. That is your present recollection, in any event? A. Yes.

(Testimony of Charles A. Mettalia.)

Mr. St. Clair: That is all I have, your Honor.

Mr. Eisner: I have just a couple of more questions.

Mr. Murman: Well, let me ask him first.

### Redirect Examination

By Mr. Murman:

Q. Mr. Mettalia, in answer to a question Mr. Eisner propounded to you, you said \$7800 you mentioned as [83] having been paid for the claims was all the amount paid out. Was that with reference to claims alone? A. \$78,000?

Q. \$7800.

A. That figure would be moneys paid in claims and expenses, of course.

Q. Expenses in connection with claims?

A. That is right.

Q. That had nothing to do with the acquisition cost? A. Oh, absolutely not.

Q. Or engineering cost? A. No, sir.

Q. So that that figure does not stand by itself as the only out-of-pocket payments of the company?

A. No, sir. We in the insurance field have three costs, sometimes more than three. Production, acquisition cost, and legal cost such as handling claims.

Q. So this \$7800 is just one of three?

A. That is only attorney or legal expenses in connection with claims. In addition to that you have production cost, which averages about 13 to 14 per cent.

(Testimony of Charles A. Mettalia.)

Q. Of what?

A. Of a dollar income. Then you have acquisition cost, which is based on about 11 per cent, 10 per cent. I think in this case our production cost was about 13 per cent. [84]

Q. Of each dollar that the company took in?

A. That is correct.

Q. Just to clarify it, because there may have been some misunderstanding during the questioning by Mr. Eisner, inadvertent though it may have been, this notice, Plaintiff's Exhibit 1, which was sent to the rating bureau, that was sent after you and Mr. Cantlen had your conference you just talked about and had worked up a premium rate on the work sheet, isn't that right? A. Yes, sir.

Q. That conference, in turn, preceded the filing with the Railroad Commission and the ICC and the issuance of the binder, isn't that right?

A. Yes.

Q. There was another conference with Mr. Cantlen regarding rates following the approval of this, but as I understand your statement the policies were written up following the approval in connection with that original meeting of about August 15?

A. There may have been conferences after this rating was approved.

Q. As to change of rate?

A. As to change of rate. That is possible. I am not sure of any dates, but I do remember a conference with Mr. Cantlen after these rates were

(Testimony of Charles A. Mettalia.)

agreed upon. There was a [85] request for a change of some kind.

Q. Oh, yes, but between the date you and Mr. Cautlen talked, the time that the bureau approved, and the time that the policies, Plaintiff's Exhibits 3 and 4, were written up there was no change?

A. No.

Q. If there was any conversation about this rate, so far as your mentioning the standard rate, that came afterwards?

A. Yes. We would not have any authority to deliver that—we could deliver it, but wouldn't have any authority to use any other rate other than what we used in this.

Q. Which the Bureau approved?

A. That is correct.

Q. This endorsement No. 8 that has been called to your attention on the excess policy relating to the retrospective rate plan, did I understand you correctly to say that was there for the purpose of clearly setting forth that the rate is the excess of your standard rate?

A. Both rates are really standard rates.

Q. But the excess rate——

A. The purpose of this was really to make your excess limit a guaranteed cost basis so that we wouldn't be penalizing the insured in the event of a catastrophic loss.

Q. Then the claim that it is there to show an excess guaranteed rate, that can't be changed by anything, is that correct? [86]

(Testimony of Charles A. Mettalia.)

A. That is right.

Q. And that there was in the primary some negotiation regarding a speculative arrangement which had no relation to the excess, is that correct?

A. That is correct.

Mr. Murman: I have no further questions.

### Recross-Examination

By Mr. Eisner:

Q. Just one or two questions. Did I understand you, Mr. Mettalia, that the policies went back to New York for signature? A. No, sir.

Q. Did I understand you that the retrospective agreement went back to New York for signature?

A. Yes, sir. Not for signature.

Q. For approval?

A. There was a slight typographical error in the agreements, so when I sent them back to New York I wrote the boys to have one of the officials of the company sign it rather than have it come back, or retyped and have it signed here, then go back for an official signature. You see, any insurance policy on an investment of that type, we as employees have no authority to sign it. They must be signed by an officer of the company. So, to expedite that mailing back and forth, I suggested Mr. Robinson or one of the officers sign that agreement. The policies never go back—I mean, we have [87] counter-signature authority to sign the policy.



(Testimony of Charles A. Mettalia.)

Q. But it differs in that respect with a retrospective agreement?

A. Your retrospective agreement has no provision for counter-signature.

Q. So that you sent the retrospective agreement back to New York for signature?

A. That is right, where the agreement was originally typed.

Q. Oh, the agreement was drawn up in New York?

A. That is correct.

Q. It was not drawn up in San Francisco, it was drawn up in the home office?

A. Yes. We have no officer in San Francisco, you see.

Q. Then as I understand it, this defendant's Exhibit C was drawn up in New York and sent out to your company, to the agency in San Francisco?

A. Branch office.

Q. To the branch office in San Francisco?

A. Yes, sir.

Q. And when it came out it was signed by the home office, was it, signed by an officer of the company in New York?

A. Not originally. It wasn't signed by anyone in New York. When we received it here, I believe someone—I don't know if it was an underwriter or someone, found a slight error in some of the figures and I sent back to be corrected and have it [88] signed by an officer so that we would eliminate that waste of time by having it signed by the insured, then having it sent back to New York to be

(Testimony of Charles A. Mettalia.)

signed by one of the officers, and then delivered to the insured.

Q. Where is Mr. Robinson? Is he in New York?

A. Yes, sir. He is a vice president.

Q. His signature to this Defendant's Exhibit C of "H. S. Robinson," as I read it, was affixed in New York and sent out to the branch office in San Francisco, is that true?

A. That is right.

Q. At the branch office you had in your possession, returned from New York, this Plaintiff's Exhibit C—Defendant's Exhibit C, at the time that you delivered the two policies to Mr. Cantlen?

A. We had this in our possession?

Q. Yes, at the time you delivered the two policies to Mr. Cantlen, on or about October 1, you had by that time received back from New York——

A. Possibly.

Q. ——the corrected Exhibit C bearing the signature of Mr. Robinson?

A. I believe so.

Q. To your knowledge, did the Fidelity and Casualty Company make any demand upon the insured or upon Bayly, Martin & Fay for any additional premium other than what the insured had [89] remitted monthly from September 1 prior to the month of October, 1947?

A. I couldn't answer that, sir.

Q. I mean so far as you know.

A. I don't know.

Q. Was there any request made by the Fidelity and Casualty Company for any additional premiums prior to the month of October, 1947?

A. I don't know. That is still another division

(Testimony of Charles A. Mettalia.)

of our organization. I have nothing to do with the premiums.

Mr. Eisner: That is all.

Mr. Murman: That is all. Do you have any further questions?

Mr. St. Clair: I would like to clarify one thing, your Honor, if I may.

Q. Mr. Mettalia, did I understand that, within your intracompany organization, that this matter of fixing of the rate—where was that determined? Here? These rates which you were going to charge the California Motor Transport.

A. It is a combination of things, sir. We work up our loss ratio and we submit our facts to our home office to see whether or not our figures are correct. When we get all that information, then we submit all this in this form to the National Bureau here in San Francisco, they having the final word as to whether we can use that rate. If they say no, it is no. [90]

Q. I mean as within your company.

A. Within the company we don't—we just have to judge based on our experience.

Q. Did you have any authority to change that \$2 rate, for instance, you personally? A. No, sir.

Q. Did you have any authority to change the \$1 or \$3 limits? A. No, sir.

Q. That would be determined by the New York office? A. No.

Q. I mean combination of the two. I see what you mean.

(Testimony of Charles A. Mettalia.)

A. They could suggest. Our home office would only suggest, but the governing office would still be the National Bureau.

Q. I understand, but as within your company did you have an authority to say what was going to be filed with the Bureau?

A. Well, more or less, I would say, yes. Yes.

Mr. St. Clair: That is what wasn't clear to me.

### Further Redirect Examination

By Mr. Murman:

Q. But you had to get approval from someone before you could ask?

A. Had someone in our home office given us authority, I will; but many times we in our branch office would rather write someone, submit the case to the home office.

Q. In this particular instance you did that, did you not?

A. Oh, yes. We closely corresponded with the home office and [91] they discussed it with me personally on my visits to the home office.

Q. If the home office approved, you then submit it to the Bureau and ask the Bureau's approval?

A. That is correct.

Mr. Murman: That is all.

Mr. St. Clair: That is all.

(Witness excused.)

Mr. St. Clair: May I ask Mr. Murman if Mr. Mettalia will be here later at the trial?

Mr. Murman: Oh, yes, he will be here.

C. A. CHALLBURG

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: C. A. Challburg.

Direct Examination

By Mr. Murman:

Q. What is your business?

A. Auditor for the Fidelity and Casualty Company.

Q. How long have you been so employed?

A. Twenty years.

Q. Are you presently employed as such?

A. Yes, sir.

Q. Were you employed in that connection during the years 1946 and 1947? [92]

A. I was.

Q. I show you, Mr. Challburg, what purports to be a series of documents consisting of gross receipts reports from the defendants in this case to the Fidelity and Casualty Company under SPL-20950 and SPL-20968, and ask you to look at them to determine whether or not those reports were received by you.

A. They were, yes.

Mr. Murman: At this time, if the Court please, I offer in evidence these reports, collectively, as one exhibit. They are dated September, 1946, October, 1946, November, 1946, December, 1946, January 1 to 19, 1947.

(The reports were marked Plaintiff's Exhibit 10 in evidence.)



(Testimony of C. A. Challburg.)

Q. (By Mr. Murman): Mr. Challburg, what did you do on each occasion that you received one of those reports?

A. An audit statment was typed and sent to the assured—pardon me; sent to the broker, and a copy sent to our accounting department in order to set up the charge.

Q. In making up the audit statement did you use the figures submitted to the plaintiff on these gross receipts reports Plaintiff's Exhibit 10?

A. Right.

Q. The audit report, then, that you made up was notice of confirmation—— [93]

Mr. Eisner: If you please, counsel, I haven't followed that last question.

The Court: Reframe the question.

Mr. Murman: Yes.

Q. Did the audit statement you made up confirm these gross receipts reports as being correct?

A. Well, except that was a voluntary, subject to final audit.

Q. Based on figures submitted in these particular reports? A. That is right.

Q. All of the figures? A. Right.

Q. They do constitute that type of report I just mentioned, confirmation of the figures shown here?

A. That is right, yes.

Q. I show you what purports to be the statements that you just mentioned, audit reports, I think you call them. A. That is right.

Q. And ask you to state whether or not those are

(Testimony of C. A. Challburg.)

the audit reports based on the gross receipts reports which you previously identified and that bear Plaintiff's Exhibit No. 10.           A. They are.

Q. I note, Mr. Challburg, that whereas there are five gross receipts reports, there are only four audit reports. Can you explain that?

A. The last one of the reports wasn't billed due to the fact [94] that it is taken care of in the final audit.

Q. When you say the last one, are you referring to the gross receipts report shown on Plaintiff's Exhibit 10?           A. That is right.

Q. Dated what?

A. Dated January 1 to January 19, 1947.

Mr. Murman: At this time, if the Court please, I offer in evidence as plaintiff's exhibit next in order the audit reports identified by the witness.

(The reports were marked Plaintiff's Exhibit 11 in evidence.)

The Court: In other words, you have got to get these gross receipts reports from either the defendant or his broker?           A. That is right.

Q. Then you take them and send that to the auditing department and also to the accounting department?

A. Send a copy of this statement we make up—we make this statement and send a copy.

Q. What is the other statment?

(Testimony of C. A. Challburg.)

A. More or less of a copy of the report received from them.

Q. You send one to the broker and one to the auditing department? A. That is right.

Q. And one to the accounting department?

A. That is right. [95]

Q. And they make the bill up in the accounting department? A. That is right, sir.

Q. (By Mr. Murman): Mr. Challburg, did you make a final audit in this particular case involving these defendants in connection with Policy No. SPL-20950 and SPL-20968? A. I did.

Q. Where was that audit made?

A. At the company—at the California Motor Transport office.

Q. That is in the office of the defendants?

A. That is right.

Q. Was it made in the presence of someone there? A. Yes.

The Court: What time was that?

Mr. Murman: I was going to develop that, your Honor.

Q. I show you, Mr. Challburg, what purports to be an audit made by you in response to a payroll audit requisition, and ask you to state whether or not those documents constitute the audit, the final audit made by you. A. That is right.

Q. And in whose presence, can you state, was the audit made? A. Mr. Davis.

(Testimony of C. A. Challburg.)

Q. As one of the California Motor Transport, he signed, did he, in your presence?

A. That is right. [96]

Q. His signature appears right on there?

A. Yes.

Q. There is a date on there of April 2, 1949?

A. That is right.

Q. Is that the date he signed?

A. That is the date the audit was made.

Q. That is the date the audit was made. I note, Mr. Challburg, that these audits appear to be carbon copies. Do you know where the originals are?

A. The originals are at our home office in New York.

Q. Can you tell by looking at these audits, in fact, they are true carbon copies?

A. Yes, they are.

Q. Everything appearing there in the carbon was placed on there when?

A. Placed on the date April 2, 1947.

Q. That is the date you made the audit?

A. That is right.

Q. There are certain things penciled on there. Was that on there at the time you made the audit?

A. No, this was filled in later for the payments.

Q. Do you know who filled that in later?

A. No, I don't know. It would be probably one of the clerks in the auditing department.

Q. It wasn't filled in by you? [97] A. No.

Q. But the other figures on here in carbon were made by you? A. That is correct.

(Testimony of C. A. Challburg.)

Mr. Murman: At this time, if the Court please, I offer in evidence as plaintiff's exhibit next in order the audits identified by the witness, and ask that they be so marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(The audit reports were marked Plaintiff's Exhibit 12 in evidence.)

Mr. Murman: If the Court please, I would like to read from part of this, the first of it. The first one refers to SPL-20950 and reads:

"Assured, California Motor Transport Company, Ltd.; Address, 625 Brannan Street, San Francisco; Effective 9/1/46; Expires 1/21/47; Agent or broker, Bayly, Martin & Fay; Canceled 1/21/47, by notice."

Then there are working classifications: Truckmen, clerical office, salesmen,—I will have to ask you, Mr. Challburg, to interpret the writing. What is that?

A. "Owners Protective."

Q. Then one more, "Contractual"?

A. That is right.

Mr. Murman: Opposite each of those is the amount of the audit, the rates, and the earned premium, showing a total earned premium on the excess policy of \$1,891.48. [98]

The Court: Is that the one signed by Mr. Davis?

Mr. Murman: Yes, your Honor, that first sheet is signed by Mr. Challburg. The entire audit is signed by Mr. Davis covering both policies.



(Testimony of C. A. Challburg.)

Q. As I recall, there was another audit for which the premium was calculated as to both policies, isn't that right?

A. That is right.

Q. The second audit refers to the primary policy, SPL-20968, and it sets forth automobile receipts, amount, and the earned premium of \$1,508.64. That is taken from the audit itself, isn't that right, Mr. Challburg?

A. It will be taken from the figures, yes. Here is your gross figures here, see? Just carried forward on this 746.

Q. That is the audit that refers to the primary policy of SPL-20968, isn't that correct?

A. That is right.

Q. That is on this sheet Mr. Davis signed?

A. Right.

Q. These other figures——?

A. The other figures are all the sums of these.

Q. For the different periods?

A. No, for the different lines, the different truck lines.

Q. I see. Each one sets forth California Motors, Red Line Transfer, Red Line San Francisco, Sunset, Coast Line, and so forth? [99]

A. That is right. And the second sheet is the payroll, the shop payroll, salesman payroll, office payroll.

Q. Where does it show that?

A. That is carried forward onto this section here. 136,339, and so forth down.

Q. And you are referring to the excess——

(Testimony of C. A. Challburg.)

A. That is right.

Q. —20950. Then based on those figures you compute the premium, is that correct?

A. That is right.

Q. That is shown here on the face of the exhibit as 1891.48? A. That is right.

The Court: That is covered by one count of the complaint?

Mr. Murman: That is the second count. 1508.16 is the second one? A. That is right.

Mr. Murman: That is the first count of the complaint. That is the total premium, your Honor, subtracted from what is paid on the voluntary reports.

The Court: I see, to the amount of about \$5300.

Mr. Murman: No; \$5,950.52.

Q. Isn't that shown here?

A. That is right.

Q. When that information was developed on the final audit, Mr. Challburg, what did you do with that information? [100]

A. Sent out copies to the broker and also to our accounts department.

The Court: Let me see that exhibit, will you?

Q. (By Mr. Murman): Now, Mr. Challburg, I show you what purports to be copies of the audit report which was just referred to as having been sent out to the broker and to the cashier, and ask you if you identify them as such? A. They are.

Q. And the date that appears on here is October 22, 1947. Do you recall that as being the date? I understand, Mr. Challburg, that there may have

(Testimony of C. A. Challburg.)

been two audit reports?           A. I think so, yes.

Mr. Murman: I will withdraw these for the moment, then, and take up the earlier ones.

Mr. Eisner: I don't understand. What are you withdrawing?

Mr. Murman: The ones I had are a later date. These are the ones he apparently sent out because the audit was made in April of 1947. These are a later date.

Mr. Eisner: You say the audit was made in April, 1947?

Mr. Murman: Yes. Isn't that it? I think Mr. Challburg testified the audit was made——

The Court: It was dated April 2, 1947.

Q. (By Mr. Murman): Yes. And the audit was made on the date you signed it? [101]           A. Yes.

Mr. Murman: And that is April 2, 1947. That is on the bills here. You see they are dated April 2, 1947 (handing documents to counsel).

Q. Exclusive of these covering statements, Mr. Challburg, I show you what purports to be the audit statement that you referred to as having been sent to your broker and the cashier.

A. I would say they were, that is right.

Q. Those were made up in your department, were they?           A. Yes.

Q. They were based on your audit?

A. That is right.

Q. These were sent to the broker and the cashier in your own office?           A. Yes.

(Testimony of C. A. Challburg.)

Q. The broker, you mean Bayly, Martin & Fay, as appear here?      A. That is right.

Mr. Murman: Now, your Honor, there is attached to these audit reports since they have been furnished to me by Mr. St. Clair some statements, one statement as addressed by Bayly, Martin & Fay to California Motor Transport Company. I have no objection to those remaining on the exhibit, and I am willing that the exhibit go in evidence in its entirety, with [102] the understanding that we are furnishing the audit report, but that the bill which appears there is being furnished by the third party defendant.

The Court: All right.

Mr. Murman: Is that correct?

Mr. St. Clair: Yes. If satisfactory with Mr. Eisner, it would be better to do it that way because they have a relevancy later, tied together.

The Court: That is all right. It is all Exhibit 13?

Mr. Murman: Yes. We are only responsible for one part and the third party defendant are responsible for the other part.

The Clerk: Plaintiff's Exhibit 13 in evidence. I will clip these together so they won't get separated.

(The documents were marked Plaintiff's Exhibit 13 in evidence.)

The Court: In other words, these audits here are really bills computed and show what the premium is. They were prepared by your office, Mr. Challburg?

The Witness: That is right, sir.

(Testimony of C. A. Challburg.)

The Court: Then the bill that was sent out of your office, of course, was sent by Bayly, Martin & Fay to the defendants?

Mr. Murman: That is correct, your Honor. We supplied the broker with the audit report and he made up the bill from the [103] report; that is the way I understand it.

Mr. St. Clair: That is right.

Mr. Eisner: Of course, we don't accept the statement as correct as to what actually occurred.

Mr. Murman: That will be developed further. We can only go as far as the audit statements at this time.

Mr. Eisner: Can I have the bills dated October 22, 1947?

Mr. Murman: We are going to put them in evidence. I have withdrawn them.

Mr. Eisner: I would like to have them. Your complaint recites demand was first made October 22.

Mr. Murman: It was based on these, but I understand that the actual bill was sent out on April 17, which we have here.

Mr. Eisner: Has anyone said it was—that the bill was sent on April 17?

Mr. Murman: Mr. Challburg just identified it as having been made up at that time.

Mr. Eisner: Has anyone said any bill was mailed to the insured on April 17?

Mr. Murman: Let's ask him.



(Testimony of C. A. Challburg.)

The Witness: The date the bill was made up in our department, that day.

Q. (By Mr. Murman): When were they sent out? A. Possibly the same day. [104]

Q. You mean there may have been a day or two delay? A. A day delay, possibly.

Mr. Eisner: May I ask to whom they were sent, Mr. Challburg, to Bayly, Martin & Fay or to whom?

The Witness: To Bayly, Martin & Fay.

Mr. Eisner: Well, pardon me for the interruption.

Mr. Murman: That is all right.

Mr. Eisner: Do you know when that bill was mailed first to the insured?

The Witness: No. All our bills go to the broker, Bayly, Martin & Fay.

Q. (By Mr. Murman): They went out on or about the date shown in the audit report?

A. That is right.

The Court: Where did you get those bills from?

Mr. Murman: Mr. St. Clair furnished them. I got these reports from him because we had furnished them to him and I didn't have them in my file. I had the later report.

The Court: The bills, I mean, that were addressed by Bayly, Martin & Fay to the defendant.

Mr. Murman: They were furnished me by Mr. St. Clair just now when he furnished me these audit reports, which we in turn had sent to the broker.

Mr. St. Clair: I merely ask that they be kept together because they have a relevancy together later. [105]

(Testimony of C. A. Challburg.)

The Court: Whose possession did they come from?

Mr. St. Clair: Our possession. The entire Exhibit 13 was in the files of Bayly, Martin & Fay.

The Court: Is that a carbon copy of the bill or the original of the bill?

Mr. Murman: You can tell better than I, Mr. St. Clair.

Mr. St. Clair: I am informed it is the original which got back into the Bayly, Martin & Fay files through a procedure that will appear later.

Mr. Eisner: That is an affirmation, that it came from the Bayly, Martin & Fay files, if it ever went out of there.

Mr. Murman: You may cross-examine.

### Cross-Examination

By Mr. Eisner:

Q. Now, Mr. Challburg, first of all, there has been produced here Plaintiff's Exhibit 10, which purports to be a statement of gross receipts, a gross receipt report sent by Bayly, Martin & Fay to the Fidelity and Casualty Company for the month of September, 1946, October, 1946, November, 1946, December, 1946, and January 1 to January 19, 1947. Now, then, can you tell me when these reports were received by Fidelity and Casualty from Bayly, Martin & Fay?

A. I can tell you approximately, if you get a copy of the voluntary report.

Mr. Eisner: Yes. Counsel, do you have that?

(Testimony of C. A. Challburg.)

Mr. Murman: They are in evidence here. [106]

The Court: Will you give me that exhibit number? 10?

Mr. Eisner: I don't think that went in.

Mr. Murman: What did you ask?

The witness: Copy of the voluntary monthly statement that we send.

Mr. Murman: Oh, I see.

Mr. Eisner: The statements that were sent to you were by Bayly, Martin & Fay accompanying those reports. Is that what you are asking for?

A. No.

Q. At the time Bayly, Martin & Fay sent you—I mean the company—— A. Yes.

Q. ——these statements, there was also a communication sent by Bayly, Martin & Fay that these reports accompanied, isn't that right?

A. That I don't know. This is all the audit department gets.

Mr. Murman: This is what you are referring to, isn't it?

The Witness: Yes.

Q. (By Mr. Eisner): Mr. Challburg, now, can't you tell me whether or not the report for the month of September was received in the month of October or November?

A. I can tell from the copies of those.

Q. All right. [107]

A. Apparently there were three of them billed here at one time.

Q. When were they sent you? When I say

(Testimony of C. A. Challburg.)

“you” I mean the company.

A. Sometime—February 15 is the date of the audit statement.

Q. February 15, 1947? A. 1947.

Q. Then did I understand that the first time that Fidelity and Casualty Company received any report from Bayly, Martin & Fay for the September gross receipts of premium was in February, February 15, 1947? A. That is all I can answer there.

Q. And on February 15, 1947, did Bayly, Martin & Fay forward to Fidelity and Casualty Company at one time the report for September, 1946, October, 1946, November, 1946, and December, 1946?

A. That I can't answer.

Q. What part of it can't you answer?

A. All I can answer is the date of the audit statement.

Q. As I understand it, the dates of the audit statement that you have here represent the dates that these reports of gross receipts were received by Fidelity and Casualty Company from Bayly, Martin & Fay? A. Possibly so.

Q. Well, isn't that your testimony? [108]

A. I said I can't tell you. I don't know.

Q. Is that your best recollection?

A. Yes, to the best of my recollection those are the dates there.

Q. According to the dates that are there, is it a fact that the reports for September, October, November, December, 1946, were sent at one time by Bayly, Martin & Fay on February 15, 1947?

A. That—sent to who by who?

(Testimony of C. A. Challburg.)

Q. Sent to Fidelity and Casualty Company by Bayly, Martin & Fay.

A. That I don't know. Apparently from the audit statements, yes. Apparently, from these.

Q. That is your conclusion from this?

Mr. Murman: Is that the witness' conclusion?

Mr. Eisner: I call upon counsel to produce—they have had notice to produce—I call upon them to produce the reports, original reports from Bayly, Martin & Fay, and these reports, each one was accompanied by a letter, which I have a copy of, from Bayly, Martin & Fay.

Mr. Murman: We have produced those reports which now constitute Plaintiff's Exhibit 10 as the only reports in our possession.

Q. (By Mr. Eisner): Well, Mr. Challburg, I ask you to look—— [109]

Mr. Murman: May I see those, counsel? I haven't seen those before.

Mr. St. Clair: I might say, Mr. Eisner, when your demand was made on Mr. Murman for these letters of transmittal, he informed me he could not find them in his file, and I agreed to have here the copies of the letters of transmittal. I have them here.

Mr. Murman: I had overlooked that. Yes, I did ask Mr. St. Clair to produce them.

Mr. Eisner: Would you mind producing the copies of the letters of transmittal?

Mr. St. Clair: Not at all. I have been waiting



(Testimony of C. A. Challburg.)

patiently for an opportunity so to do. They are in the bound file for which you also made a demand on me, Mr. Eisner, so whatever is the simplest way from an evidentiary point of view. Be careful, there are vouchers attached.

The Court: How many letters?

Mr. St. Clair: There are five, sir.

Mr. Murman: One with each voluntary report, your Honor, I assume. I have never seen them myself.

Q. (By Mr. Eisner): Now, Mr. Challburg, I show you a copy of a letter dated January 27, 1947, and ask you if that refreshes your recollection that the report for the month of September and the report for the month of October, 1946, were forwarded to the Fidelity and Casualty Company by Bayly, Martin [110] & Fay under date of January 27, 1947.

A. According to that copy, yes. Of course, we wouldn't probably even seen—I mean, they probably never even kept our copy of the letter.

Q. What letter do you refer to?

A. This (indicating).

Q. You didn't keep it?

A. Probably the clerk in the audit department.

Q. You mean at Fidelity and Casualty Company?

A. That is right.

Q. The original. I show you a copy of a letter from Bayly, Martin & Fay to Fidelity and Casualty Company dated January 30, 1947, and ask you if that refreshes your recollection that under that date

(Testimony of C. A. Challburg.)

Bayly, Martin & Fay forwarded the gross receipts report for the month of November, 1946.

A. It is possible, yes; it is possible.

Q. I call your attention to the letter, copy of letter, dated February 24, 1947, and ask you if it is a fact that under that date Bayly, Martin & Fay forwarded to Fidelity and Casualty Company the gross receipts report of the California Motor Transport for the month of December, 1946.

A. That is possible, yes. This was billed February 7.

Q. I show you a communication dated March 27, 1947, and ask you if under that date Bayly, Martin & Fay forwarded to Fidelity and Casualty Company gross receipts report for [111] California Motor Transport for the period January 1 to 19, 1947.

A. That is right, sir.

Q. Now, then, Mr. Challburg, when these reports that were forwarded by Bayly, Martin & Fay came to the Fidelity and Casualty Company, were they referred to you as auditor?

A. No, they wouldn't be.

Q. To whom would they go?

A. To the clerk in the audit department.

Q. Does he serve under you?

A. Yes, that is right, sir.

Q. Then do they come to you as auditor?

A. Not until the final audit.

Q. Let me ask you, then, how many people are in your audit department?

A. At that time we had three.

Q. They were working under you?

(Testimony of C. A. Challburg.)

A. That is right.

Q. Then what was the duty of the clerk who was working under you with reference to gross receipts reports?

A. Just check extensions and see the audit statement was made up.

Q. I call your attention to the fact that in the gross receipts, September, 1946, this gross receipts report shows the gross revenue, the primary public liability at the rate of [112] .997, and property damage at .226, and with extensions showing the premium earned at that rate on the gross receipts.

A. Yes.

Q. Did you observe that?

A. That is right.

Q. Did you observe that when it was received?

A. No, we never check that until the final audit.

Q. Do you mean to say, Mr. Challburg, no one in your department, when the statement is received of gross receipts showing the rate of premium that is figured upon the gross receipts, checks the rate and premium to see whether it is correct?

A. Not until the final audit.

Q. Do you send out bills based on this statement?      A. That is right.

Q. I call your attention to the fact that down there, written on the bottom of each sheet of Plaintiff's Exhibit 10, a calculation in handwriting, \$200,910 on September, 1946—this is the first sheet attached to this exhibit—a figure \$200,910.08 at .997, \$2,003.07. Whose writing is that?

(Testimony of C. A. Challburg.)

A. That would be the clerk in the audit department.

Q. Who works under you?

A. That is right.

Q. I call your attention to the figure below, \$200,910.08 at .226, \$454.06. Is that also in the handwriting of the clerk?

A. That is right. [113]

Q. \$2,457.13, and then the word "Paid." Is that in the handwriting of the auditor?

A. Of the clerk.

Q. Can you tell me when that \$2,457.13 was paid? A. No, I can't.

Q. As I understand, Mr. Challburg, after these reports, gross receipts reports, were received, what was done with them after they were in the hands of your clerk?

A. They were filed away until final audit is made.

Q. Based on these reports, do I understand that you then made out bills, these statements which are Plaintiff's Exhibit 11? A. That is right.

Q. Those were made out in your department?

A. That is right.

Q. Those bills are based—the same amounts shown upon them, shown upon the gross receipts reports as filed with you by Bayly, Martin & Fay?

A. That is right.

Q. I see here a bill dated February 15, 1947, for \$2,457.13. You are familiar with the fact that your policy and the form, furthermore, whether 1457 or 2956, all your policies provide that the monthly

(Testimony of C. A. Challburg.)

report shall be made on the premium during the preceding month and remittance made to you, are you?      A. Yes. [114]

Mr. Murman: I object to that on the ground the policy is the best evidence.

Mr. Eisner: Well, it is preliminary.

The Court: Well, it is all right.

Q. (By Mr. Eisner): Now, then, Mr. Challburg, are you familiar with the fact that the California Motor Transport Company had forwarded and paid to Bayly, Martin & Fay the premiums that are referred to in these bills months prior to February 15, 1947?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Q. (By Mr. Eisner): Do you know that?

Mr. Murman: Also, it calls for hearsay.

The Court: He is asking him if he knows. If he doesn't know he can say so.

A. I don't know.

The Court: I don't see how he would know, myself.

Q. (By Mr. Eisner): Is it the practice of the agent, or Bayly, Martin & Fay, to remit premiums together with the gross receipts reports?

A. I don't know.

Q. What was done with this bill?

A. They were sent out to the agent, broker.

Q. Bills were made for the California Motor Transport Company. Was there any bill sent to them? [115]



(Testimony of C. A. Challburg.)

A. Not to my knowledge. Not from Fidelity and Casualty Company, I mean.

Q. Not from the Fidelity and Casualty Company? A. That is right.

Q. Now, then, you made the final audit of the records of the California Motor Transport Company when? A. April 2, 1947.

Mr. Eisner: Do you have that audit, counsel?

Mr. Murman: It is in evidence as Plaintiff's Exhibit 12. Here it is.

Q. (By Mr. Eisner): Now, then, Mr. Challburg, I understand that in April, 1947, you went down to the office of the California Motor Transport Company? A. Right.

Q. Did you go personally? A. Yes, sir.

Q. Was the purpose of your visit to the office of the California Motor Transport Company to check the gross receipts of the California Motor Transport Company from September 1, 1946, until January 21, 1947? A. Right.

Q. You went down to ascertain whether or not the gross receipts as reported by Bayly, Martin & Fay to the Fidelity and Casualty Company, as shown upon Plaintiff's Exhibit 10, were correct?

A. Right.

Q. And when you went to the California Motor Transport Company, you there saw Mr. Davis, who was the auditor— A. Right.

Q. —of the California Motor Transport Company, and you made out these—worked out something that was signed by Mr. Davis?

(Testimony of C. A. Challburg.)

A. That is right, sir.

Q. I will ask you if when this signature of Mr. Davis was appended to the second page of Plaintiff's Exhibit 12 there was anything upon this sheet with the exception of the figure showing the gross receipts.

A. That I don't know; I don't remember.

Q. You don't remember? A. No.

Q. Can you state whether or not any of the extensions, or anything that is written upon Plaintiff's Exhibit 12 other than the gross receipts were upon that exhibit at the time it was signed by Mr. Davis? A. May I have that again?

Mr. Eisner: Will you read it, please?

(Question read.)

A. No. Just the first sheet, you mean?

Q. Yes, I mean just the sheet that was signed by Mr. Davis. A. That is right. [117]

Q. Now, how about the other sheets with it? Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?

A. That is all.

Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figure as correct? A. Yes.

Q. Now, then, Mr. Challburg, your policies in

(Testimony of C. A. Challburg.)

numerous instances provide for a deposit premium, do they not?      A. Yes, they do.

Q. Is it part of the auditor's business to collect those deposit premiums?      A. It is not.

Q. Does the auditor have any records of the deposit premiums?      A. He does not.

Q. Whose business is it in the company to see that the deposit premiums that are called for by the policy are paid?      A. That is up to the cashier.

Q. The cashier?      A. That is right.

Q. The auditor has nothing, no record of it?

A. He gets a record after the final audit, yes.

Q. Doesn't the auditor receive a charge—I am no auditor, but—against the insured as shown by the deposit premium, and then later as against the charge there is a credit if payment is met?

A. At the final audit, yes.

Q. You send out these bills——

Mr. Murman: Which exhibit?

Mr. Eisner: Just a minute. I am looking at Exhibit 11 at the moment.

Mr. Murman: 13 is the final audit.

Q. (By Mr. Eisner): Possibly you can assist me. These bills on Plaintiff's Exhibit 11 are based upon the rate of .997 and .226, are they not?

A. Yes.

Q. They were sent out by Fidelity and Casualty Company to Bayly, Martin & Fay addressed to the California Motor Transport Company?

A. That is right. Those are voluntary reports, subject to audit.

(Testimony of C. A. Challburg.)

Q. You say you audited those books in April of 1947? Did you send out any bills addressed to the California Motor Transport Company before October, 1947? A. Yes.

Q. Where are they? [119]

A. They were produced a moment ago.

Q. This is Exhibit 13 to which you refer and the bills you are handing me purport to be copies, is that correct? A. That is right.

Q. When you made out these bills on April 19, 1947, did you send any copy to California Motor Transport Company?

A. No; all copies go to the broker.

Q. Mr. Challburg, after April 19, 1947, did you receive any payment from Bayly, Martin & Fay on account of the bills you rendered that date?

A. That I don't know.

Q. As auditor don't you know whether or not any payment would be made?

A. That is up to the cashier.

Q. Did you know if any further bill was sent out by Fidelity and Casualty Company of New York to Bayly, Martin & Fay, or anybody else, prior to October, 1947?

A. That I don't know. Copies might have been made; I don't know.

Q. You don't know? A. No.

Q. You are not familiar with any follow-up system in your sending out the bills? Whether they are paid is not in your department?

A. That is right. [120]

(Testimony of C. A. Challburg.)

Q. You don't know anything about that?

A. That is right.

Q. Were these bills made up in your department?  
A. They were, yes.

Q. In making up these bills did you give them a different rate in figuring the premium than was included in your bills covered by Plaintiff's Exhibit 11?  
A. Right.

Q. At whose request did you change the rate in figuring the bills between February 15, 1947, and April 19, 1947?

A. Those were given us by the underwriting department when we got the audit requisition.

Q. You don't have in your department, then, as I understand, any record of the premium rate of policies that are outstanding?  
A. We do not.

Q. And you don't check when a remittance is received or a gross receipts statement received from an insured, you have nothing in your department by which you can check whether or not the insured has figured the premium according to the rate set forth in his policy by which he is to be covered?

A. We do not.

Q. That is all done by another department that does check that?  
A. That is right, sir. [121]

Q. There is a department that does that job?

A. They are checked, as I say, in the final audit.

Q. Special final audit is made, we will say, months after the time these reports are received. Do you mean to say in the meantime there is no check made of them?



(Testimony of C. A. Challburg.)

A. Not until final audit is made.

Q. In the meantime the insured who has made his remittance remains in ignorance of that claim or whether or not——

Mr. Murman: If the Court please, how can this witness testify to the ignorance or intelligence of another?

Mr. Eisner: Well, I will withdraw the question. It speaks for itself. I think that is all. Excuse me; one more question.

Q. When you made an audit did you send a copy of it to the California Motors?

A. No, I do not.

Q. You just keep that in your file?

A. We send our copy to the broker.

Q. Did you send a copy of this audit to the broker? A. Yes. The files will——

Q. You refer to Bayly, Martin & Fay as agent?

A. As agent, yes, broker or agent.

Q. Are you familiar with whether or not collections were paid to Bayly, Martin & Fay by the California—by Fidelity and Casualty Company?

A. I don't know.

Mr. Murman: There is no question, Mr. Eisner, but what Bayly, Martin & Fay were your brokers, is there? You allege that in your pleadings.

Mr. Eisner: No, but they were our broker, and, as you allege, they were your agents for the purpose of collecting.

Mr. Murman: We don't allege any such thing.

Mr. Eisner: You allege that the reports and

(Testimony of C. A. Challburg.)

remittances were made monthly, and they could only have been made monthly if they were made to Bayly, Martin & Fay because they were made to Bayly, Martin & Fay.

Mr. Murman: There is no allegation of agency in our pleadings.

Mr. Eisner: I will ask you this:

Q. Mr. Challburg, is it the practice—do you know whether or not it is the practice of the Bayly, Martin & Fay to make collections of premiums upon policies which have been written through their office?

A. I do not know.

Mr. Murman: After all, he is just the auditor.

Mr. Eisner: I realize that, but I understand he has limited knowledge, apparently. No further questions.

Mr. St. Clair: May I ask a question or so, your Honor?

The Court: Yes. [123]

Q. (By Mr. St. Clair): Mr. Challburg, referring to Plaintiff's Exhibit 11—which are the reports made up by this witness, your Honor—do I understand you refer to those as bills?

A. Audit statements or audit bills, yes.

Q. Mr. Eisner was using the word "bills." Do you mean to have the Court believe from that statement that no money had been paid until that was received by Bayly, Martin & Fay?

A. That I don't know, what money was paid, when we get cash. It goes to the cashier.

Q. I don't want to butt my head against the

(Testimony of C. A. Challburg.)

same problem Mr. Eisner has been butting.

A. The payments are arranged with Mr. Davis. I know nothing of what has been paid.

Mr. Murman: Would it be of any help if I tell you we will produce the cashier? He will cover all that.

Q. (By Mr. St. Clair): I want to make it clear, when Mr. Eisner was cross-examining you with regard to whether or not Bayly, Martin & Fay paid Fidelity and Casualty Company, you were not inferring no money came into their hands after it issued those documents? A. No, indeed not.

Q. I understand that document was issued upon receipt of these reports? A. That is right.

The Court: All money had been paid on it already? [124]

A. That is right, your Honor.

Q. Who is that issued to?

A. It goes to Bayly, Martin & Fay, the broker.

Q. If there had been money paid on account wouldn't it be on that document?

A. The check wouldn't come into the audit department. It would come to the cashier.

Q. (By Mr. St. Clair): When Mr. Eisner showed you that letter of transmittal on the report of the company—you recall he showed you a series of those? A. Yes.

Q. You will recall that—I will hand them to you and ask you to read the language there.

A. "We enclose your report of gross receipts

(Testimony of C. A. Challburg.)

for September and October under the above-captioned policies'—

Q. In other words, that was when the check was drawn?      A. No.

Q. It wouldn't show on this?

A. No, it wouldn't. I wouldn't know.

The Court: Let me see that letter. That is from your client?

Mr. St. Clair: Yes, sir. That is all I have of this witness.

Mr. Murman: I have only one question. [125]

### Redirect Examination

By Mr. Murman:

Q. In connection with Plaintiff's Exhibit 12, I believe you stated that when Mr. Davis signed this there was only the figure at the top of the page?

A. That is possible, yes.

Q. Were these other pages attached to it?

A. No, he didn't sign that one. Those are just payrolls.

Q. That page wasn't attached to the preceding page when Mr. Davis signed it?      A. No.

Q. He only signed as to the gross receipts?

A. That is right.

The Court: Let me see that.

Mr. Murman: Yes, your Honor.

The Court: Was this data on it?

A. Yes.

Q. SPL-20950?      A. That is right.

(Testimony of C. A. Challburg.)

Q. Was that on it when Davis signed it?

A. That is right.

Q. Was this statement in here, "Assured refused to sign retrospective agreements"?

A. That I don't know. That could have been added later for our own information.

Q. But the policy number was on it at the time he signed? [126].

A. That is right, your Honor.

Mr. Murman: I have no further questions. Has anyone else any further questions of this witness? I understand that Mr. Challburg, by prior arrangement, has been scheduled to go to Detroit tonight. I have no further reason to call him. If he may be excused at this time, it will be appreciated. Do any of you want him retained?

Mr. Eisner: Not if you are going to produce the cashier.

Mr. Murman: We will produce the cashier tomorrow morning, unless the Court wants to proceed at this time. It is four o'clock. I don't mean tomorrow morning; I mean at the next calling of this case.

Mr. Eisner: I want to say this: I would appreciate it—I have a matter before the Federal Trade Commission scheduled for meeting on Monday at Los Angeles. I realize—I thought this case could be concluded in one day, but I see I was in error. I don't know whether it would meet with the convenience of Court and counsel if we could adjourn until Wednesday or Thursday of next week.



(Testimony of C. A. Challburg.)

(Colloquy between Court and counsel reported but not transcribed.)

The Court: We will continue then, until Wednesday. I don't see any need to put on another witness now. It is a quarter after four.

Mr. Murman: May Mr. Challburg be excused to go to [127] Detroit?

The Court: Yes.

Mr. Eisner: We stipulate to that.

Mr. St. Clair: So shall we.

(Thereupon the hearing of the instant cause was continued until Wednesday, October 5, and thereafter continued until Monday, October 10, 1949, at 10:00 a.m.) [127-A]

Monday, October 10, 1949, 10:00 A.M.

Mr. Murman: We had finished with the testimony of Mr. Challburg, the auditor, last Friday a week ago. Mr. Mettalia, the superintendent of the casualty department, had testified and then we called Mr. Challburg, the auditor.

The Court: Yes.

Mr. Murman: He had been interrogated and excused because he had to leave for the East. This morning I am proceeding with Mr. Rechnagel, the cashier.

CHARLES RECHNAGEL

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: Charles Rechnagel.

Direct Examination

By Mr. Murman:

Q. What is your business?

A. I am cashier for the Fidelity and Casualty Company.

Q. How long have you been so employed?

A. Thirty-two years.

Q. Have you been in San Francisco during that full period of time?           A. No, sir.

Q. Are you familiar with the case on trial in so far as your department is concerned, Fidelity and Casualty Company v. [128] California Motor Express Company?           A. Yes, sir.

Q. Mr. Rechnagel, I show you a group of six blue pieces of paper on which there is some writing, directed to California Motor Express, and ask you to identify what those are.

A. These are our ledger cards covering the various entries received in connection with this particular policy.

Q. That is the entries made in your department?

A. Yes, sir.

Q. These are the records of your department, then?           A. That is right.

Q. I show you now four of the six cards which

(Testimony of Charles Rechnagel.)

you have identified—by the way, are these ledger cards?      A. That is right.

Q. —and ask you to state what each is in order as I give them to you. The first one relates to SPL-20950 and SPL-20968, gives the assured as California Motor Transport Company, refers to audit of 2/15/47; location of risk, from 9/1/46 to 10/1/46, and ask you if that is a ledger card covering that period of time, from 9/1/46 to 10/1/46.

A. Yes, sir.

Q. In the upper right-hand corner there is listed a total of \$2,457.13. What is that?

A. That means that we were to bill the California, or charge California Motor Transport Company \$2,457.13 as an earned [129] premium from the time September 1, 1946, to October 1, 1946, on that particular policy.

Q. Does that card show when that was paid?

A. Yes.

Q. Where is that?

A. Right here (indicating).

Q. You point to a stamp "Paid March 15, 1947"?

A. That is right.

Q. That is the date that amount was paid?

A. That is the date it was posted in my records.

Q. Is that the date you took the amount into your records as a payment?      A. That is right.

Q. It may have been received by the company before that, but it was posted on that date?

A. That is right.

The Court: How much is that?

(Testimony of Charles Rechnagel.)

A. \$2,457.13.

Q. (By Mr. Murman): That was from the period 9/1/46 to 10/1/46? A. Yes.

Q. I show you a similar card with similar notations from October 1, 1946, to November 1, 1946, showing a total of \$1,514.83, and ask you if that similarly reflects a posting of that amount of money for that period on your records? [130].

A. That is right, yes, sir.

Mr. St. Clair: What was that sum, Mr. Rechnagel?

The Witness: \$1,514.83.

Mr. St. Clair: Thank you, sir.

Q. (By Mr. Murman): That was—that also showed the same date of posting?

A. March 15, 1947.

Q. I show you a similar card covering the period 11/1/46 to 12/1/46, showing a total of \$2,040.62, and ask you if that shows the amount billed and the amount posted in your ledger.

A. It shows the amount that was posted in our ledger, posted again on March 15, 1947.

Q. That is borne out by the stamp on the record?

A. That is right.

Q. I show you a fourth card, similar in nature, bearing the period 12/1/46 to 1/1/47, showing \$2,036, and ask you if that shows a similar record.

A. Yes, sir, and that was posted on my records as of March 24, 1947.

Q. That is borne out by a similar stamp only it is a later date, is that correct?

(Testimony of Charles Rechnagel.)

A. That is correct.

Q. In addition to the four cards which I have shown you, Mr. Rechnagel, I show you a similar colored card referring to SPL-20968. The other cards which I have shown you have [131] referred to both policies, have they not? A. Yes, sir.

Q. SPL-20950 and 20968? A. Yes.

Q. This refers only to policy No. SPL-20968?

A. Yes.

Q. That covers on its face the period from 9/1/46 to 1/21/47, after which appear the letters "CANC." What does that mean?

A. Canceled out on our record November 7, 1947, and it was placed in the suspense account.

Q. I am referring not to that part, but above here, following the words "from 9/1/46 to 1/21/47, Canc."

A. That means that policy was canceled on that day, on January 21, 1947.

Q. In the upper right-hand corner there appears the figure \$5,950.52. A. That is right.

Q. There also appears on there—well, first, what does that figure represent?

A. That represents, in this case, the total earned premium for the time that this policy was in force.

Q. Is it gross or net?

A. That would be the remainder after giving the assured credit for whatever was present on that particular account.

Q. On the others, if I may ask, the figures on the



(Testimony of Charles Rechnagel.)

first four [132] cards were actually paid to Fidelity and Casualty?     A. That is right.

Q. After giving credit for those amounts you reached a net due?     A. That is correct.

Q. That is the amount you have just identified?

A. That is correct.

Q. That card shows—By the way, that net is as to that one policy only?     A. Yes.

Q. This card shows stamped on it, "Billed July 28, 1947." What does that mean?

A. That means we billed our agent on that date, Bayly, Martin & Fay.

Q. Agent?     A. Broker.

Q. Was Bayly, Martin & Fay your agent?

A. No, they are brokers.

Q. When you said "our agent," what did you mean by that?

A. We do have agents, our company.

Q. When you said your agent, you meant Bayly, Martin & Fay are brokers?     A. That is right.

Q. Down below there is the word "Suspense" stamped. What does that mean? [133]

A. Because this item wasn't paid, we cancel it from an active account on November 7, 1947, and placed it in what we call our suspense account.

Q. That is an account to be collected?

A. Yes.

Q. When you said you took it from the active account on November 7, 1947, you referred to the date which is just above it, November 7, 1947, is that right?     A. That is right.

(Testimony of Charles Rechnagel.)

Q. I show you a fifth similar card to which is attached a similar note, but yellow in appearance, and ask you what that is.

A. Here again is a final audit representing a balance due for the time of this particular policy, this particular report, from September 1, 1946, to January 21, 1947.

Q. When you say "this particular policy," what are you referring to? A. SPL-20950.

Q. That is the excess policy as to automobile and primary as to other risks? A. Yes.

Q. Is the reason for two cards because of the fact that this policy is excess as to automobiles, these blue cards? A. That is right.

Q. And the yellow card is primary risk as to other coverage, [134] is that right? A. Yes.

Q. That shows a similar stamp, "Billed July 28, 1947," is that correct? A. Yes.

Q. That is the date on which the billing was billed? A. Yes, sir.

Q. As in the case of the other card?

A. Yes.

Q. Only 20968 it refers to?

A. That is right.

Q. It also shows a stamp, "Suspense," and then the date, "November 7, 1947"?

A. That is right.

Q. So that it had become uncollectible and placed in the suspense account? A. Yes.

Q. The totals here which show on this card are \$1,508.16 as to the excess, is that correct?

(Testimony of Charles Rechnagel.)

A. Yes, sir.

Q. And on the other insurance which the excess policy covers, as a primary policy, there is the figure \$383.32?

A. That is right.

Q. Was the total premium that was placed in suspense as not collectible the total of those two figures? [135]

A. Yes, sir.

Q. I noticed down here at the bottom of this card something which doesn't appear on the others, the entry "3/31/47," showing \$1,082.54 paid. Can you explain that to the Court?

A. At the time that the—prior to the time that this item was placed in suspense we had in our agency balance account, or unapplied cash account, a payment of \$1,082.54, and because we didn't have an entry for that particular amount at that time we posted it to this card.

Q. You posted it on these cards?

A. That is right.

Q. Was that a payment on policy 20950?

A. No, on the other policy.

Q. So that was an error, then, putting it on that card?

A. It is an error. The actual balance here is the full amount.

Q. The actual balance is the full amount?

A. That is right, on that particular policy.

Q. \$1,508.16 and \$338.33?

A. That is right.

Q. Am I correct in asking, Mr. Rechnagel, where the blue registration card is for the \$1,082.54?

(Testimony of Charles Rechnagel.)

A. We never got any for that from our auditing department.

Q. So that you don't have a blue card similar to these first ones to cover it? [136]

A. That is right.

Q. This was posted to the wrong policy?

A. That is right.

Q. When this card, then, No. 5, the audit \$5,950.52, placed in suspension, policy 20968, the primary, does that net amount—did you take into consideration this payment of \$1,082.54?

A. Yes, sir.

Q. So that that is a total net due, then?

A. That is a total net due.

Mr. Murman: At this time I ask all these cards be placed in evidence as plaintiff's exhibit next in order, collectively as one exhibit.

(The ledger cards were marked Plaintiff's Exhibit 14 in evidence.)

Mr. Murman: I have no further questions. You may cross-examine.

#### Cross-Examination

By Mr. Eisner:

Q. Mr. Rechnagel, when a policy is issued by the Fidelity and Casualty Company are you given information in your department? A. Yes, sir.

Q. That the policy has been issued?

A. Yes, sir.

Q. What information are you given? [137]

A. We are given a copy of the policy, that is, what we call our daily report.

(Testimony of Charles Rechnagel.)

Q. That daily report is virtually a copy of the policy, is it not?           A. Yes, sir.

Mr. Murman: Not virtually; it is actually, Mr. Eisner.

Mr. Eisner: Thank you. I accept the correction.

Q. It is then the business of your department, as cashier, to make the correct billings for it?

A. Yes, sir.

Q. If a policy calls for a payment as a deposit premium upon its execution, your department makes that collection, does it?           A. Yes, sir.

Q. And in order to make that collection what does your department do? Do you bill the broker in the transaction?

A. We bill the broker in the transaction.

Q. Is the broker in the transaction, such as Bayly, Martin & Fay, then relied upon by the company to make the collection from the insured?

A. Yes, sir.

Q. Is the broker authorized by the company, your company, to make the collection in its behalf and then remit to the company?

A. The broker is authorized.

Q. The broker makes the collection on your behalf? [138]           A. That is right.

Q. If the premium is not paid when it is due, you bill the broker, send the bill to the broker?

A. That is right.

Q. Now, then, Mr. Rechnagel, I call you attention to the fact that Policy No. 20950, Plaintiff's Exhibit 4 in this case, calls for a deposit premium of



(Testimony of Charles Rechnagel.)

\$6,685.40.      A. Yes, sir.

Q. Did your department make collection of that deposit premium?      A. No, sir.

Q. Did you send any bill to the broker for that deposit premium?

A. Yes—I can't say that we did, because we don't have any records of that.

Q. You have no record of having sent any bill to the broker for that deposit premium?

A. No, sir.

Q. Did you ever, according to your records, ever send any bill to the broker or to anybody else, the insured, for that deposit premium?

A. I can't say I did.

Q. Well, you know that you didn't, don't you, Mr. Rechnagel?      A. No, it might have.

Q. According to your best recollection—— [139]

A. It should have been billed.

Q. What?      A. It should have been billed.

Q. It should have been billed and wasn't billed?

Mr. Murman: That is not the witness' testimony. He said he had no recollection of it.

Mr. Eisner: All right.

Q. When you say it should have been billed, you mean according to the general practice of your company when a policy is issued which calls for a deposit premium, that it is the practice and the duty of your office to bill for that deposit premium?

A. That is right.

Q. I call your attention, Mr. Rechnagel, to

(Testimony of Charles Rechnagel.)

Policy No. 20968, Plaintiff's Exhibit 3, and I call your attention to the fact that this policy calls for a deposit premium of \$6,060, is that correct?

A. Yes, sir.

Q. Did you collect any deposit premium on that policy? A. No, sir.

Q. Is the same thing true respecting this policy and this deposit premium as respected the deposit premium called for on Policy No. SPL-20950?

A. Yes.

Q. Now, counsel has just introduced as Plaintiff's Exhibit 14 [140] a number of so-called registration cards. You know the registration cards, do you? A. Yes, sir.

Q. These are made up in your department?

A. Yes, sir.

Q. I am going to call your attention to the first of these registration cards. It bears date, as I read it, February 15, 1947? A. Yes, sir.

Q. Is that the date that registration card was made up? A. That is right.

Q. Is it a fact, then, that the first time a registration card was made up in your department for the policy 20950 and on policy 20968 was February 15, 1947? A. No.

Q. Do you have any earlier registration cards on this policy? A. Yes, the original entries.

Q. Just a moment, Mr. Rechnagel. I understand that it is your practice to make up registration cards on a policy when it is issued?

A. That is right.

(Testimony of Charles Rechnagel.)

Q. Did you make up any registration card on policy No. 20968 prior to the 15th day of February, 1947?      A. Yes, sir.

Q. Where is it? [141]

A. It isn't here, but we have made one.

Q. Is it a blue registration card?      A. Yes.

Q. What was that registration card?

A. The original premium.

Q. I will ask you to produce it for me if you have any registration card that was made up on this policy No. 20968 prior to February 15, 1947. Now, this registration card was made up on that date, is that correct?      A. That is right.

Q. I notice that it recites here under this page, "Audit 2/15/47"—February 15, 1947, audit. What does that mean?

A. That means the date our auditing department gives a billing on this particular account—it is an audit bill prepared on February 15, 1947.

Q. In other words, you in your department receive an audit bill——      A. That is right.

Q. ——from the auditing department?

A. That is right.

Q. Was that in writing?

A. No, it is a typewritten bill.

Q. A typewritten bill. That is what I meant. Will you produce it for me?

Mr. Murman: It is already in evidence. [142]

The Court: It is in evidence already.

Mr. Eisner: Oh. Which is it?

(Testimony of Charles Rechnagel.)

Mr. Murman: I think it is Plaintiff's Exhibit 11 and 12.

Q. (By Mr. Eisner): That is the—did you—as I understand, the information from which you made up the registration card in your hand was Plaintiff's Exhibit 12?

Mr. Murman: No, that is not correct; it is 11. The audit bill is 11 and that is the final audit you have in your hand.

The Court: We will take a five-minute recess.

(Recess.)

Q. (By Mr. Eisner): Mr. Rechnagel, then it is my understanding that you as cashier made up the original card that is dated February 15, 1947, from this Exhibit 11, which purports to be a carbon copy of the statement to the California Motor Transport Company?

A. These cards were made up from these bills.

Q. To make that clear, the registration cards, Exhibit 14, were made up from the bills Exhibit 11?

A. That is right, yes, sir.

Q. Did you have in your department any other information from which to make up these registration cards Exhibit 14, other than Exhibit 11?

A. No, sir. [143]

Mr. Murman: May I point out, Mr. Eisner, that those bills that Mr. Rechnagel has identified relate only to the first four.

Mr. Eisner: Yes, that is correct.

Q. And the note stating it as having been made

(Testimony of Charles Rechnagel.)

up from Exhibit 11 refers to the first four of the registration cards?       A. Yes.

Q. Which constitute a part of Exhibit 14?

A. That is right.

Q. You did have in your possession, however, the dailies of policy 20950 and 20968?       A. Yes.

Q. When did you receive those dailies?

A. Those daily reports—do we have—I can't tell you unless I see the file.

Q. Do you have the file?

A. No, I don't.

Mr. Eisner: Does counsel have the file that the witness can refer to?

Mr. Murman: I have the dailies here, Mr. Eisner.

Mr. Eisner: I suggest if you give the witness his file he probably can answer these questions.

Mr. Murman: That is so. These are the dailies (handing documents to the witness).

The Witness: These are recorded by the accounting [144] department—policy No. SPL-20950 was recorded by the accounting department October 3, 1946, and policy SPL-20968 was recorded by the accounting department on October 8, 1946.

Q. Yes. Then on February 15, 1947, when you received these statements, Plaintiff's Exhibit 11—

A. Yes, sir.

Q. —you had had these dailies in your possession since the prior early October?

A. That is right.

Q. 1946?       A. Yes, sir.

Q. When you received Plaintiff's Exhibit 11



(Testimony of Charles Rechnagel.)

did you observe that the rate at which the premium was calculated was .997 and .226?

A. No, because it isn't necessary.

Q. Why?

A. Because the auditing department, when they put through this bill, they are supposed to be correct.

Q. You made no reference then to the dailies that were in your possession? A. No, sir.

Q. Your department then simply accepted the statement of the auditing department as correct?

A. That is right, because if there is any mistake that would be picked up by the final audit, you see. [145]

Q. Now, then, Mr. Rechnagel, is it the practice of your department to make up ledger cards such as the first four ledger cards of Exhibit 14, as soon as the policies have been issued? A. Yes.

Q. I am referring next to the last two ledger cards in Exhibit 14. I call your attention to the fact that that ledger card, the fifth ledger card in this exhibit, is dated May 1, 1947? A. Yes.

Q. Was that the date that that ledger card was made out? A. Yes.

Q. Now, when that ledger card was made out on May 1, 1947, was that ledger card made out from Plaintiff's Exhibit 12? A. No, sir.

Q. What did you have in your possession on May 1, 1947, when you made out this registration card?

A. This bill.

Q. The bill you refer to, then, is a document that is annexed as a part of Exhibit 12, is that correct?

A. Yes, sir.

(Testimony of Charles Rechnagel.)

Q. And what is there indicated is a bill to California Motor Transport Company, purporting to be a carbon copy thereof, dated 4/19/47?

A. That is right. [146]

Q. Is that correct? A. Yes, sir.

Q. And you did not have in your possession, then, any other portion of Exhibit 12? I am showing you that exhibit so that you can check it.

Mr. Murman: You say "any other portion." You mean apart from the audit bill?

The Witness: Yes. There must be another audit for \$5,950.62. I believe they were entered at the same time.

Mr. Murman: I think that is No. 13.

Mr. Eisner: That is the only audit, counsel, that I know of that has been introduced in evidence. If there is any——

Mr. Murman: You will recall Mr. Challburg, identified it as an audit made by him, and that subsequent to these audits bills were sent out which constitute Plaintiff's Exhibit 13, and that was one of those that was attached to No. 12 that Mr. Rechnagel just identified.

Q. (By Mr. Eisner): To clarify this I will ask you, Mr. Rechnagel, just what did you have in your possession as cashier on May 1, 1947, when you made up this registration card?

A. I had an audit billing, and the date of that audit billing is dated April 19, 1947, and the amount due is on that particular—for that particular entry is \$5,950.52. Then we have, [147] on the same day,

(Testimony of Charles Rechnagel.)

another bill on policy SPL-20950, and that audit bill is dated April 19, 1947, and it is in the amount of \$1,508.16.

Q. That would be an audit bill similar to the audit bill which you have identified——

A. That is correct.

Q. ——as part of Plaintiff's Exhibit 12?

A. That is correct.

Mr. Murman: For the purpose of the record, Mr. Eisner, both audit bills are in evidence as Plaintiff's Exhibit 13. You have them right there.

Mr. Eisner: I think you are mistaken, counsel.

Mr. Murman: No.

Mr. Eisner: Just a minute. Well, maybe. They are annexed as part of that exhibit.

Mr. Murman: That is our exhibit. You will recall Bayly, Martin & Fay had a statement which was attached to it, but our exhibit was the audit bill.

Mr. Eisner: That may be correct.

Q. Attached to Plaintiff's Exhibit 13, I call your attention, Mr. Rechnagel, to carbon copies of statements dated April 19, 1947. A. Yes, sir.

Q. And the carbon copies of the statements directed to the California Motor Transport Company on the letterhead of [148] Fidelity and Casualty Company of New York are carbon copies of the statements that you received on May 1, 1947——

A. That is right.

Q. ——from which you say you made up that registration card? A. That is right.

Q. Very well. Now, then, when you made up

(Testimony of Charles Rechnagel.)

that registration card you made up a new charge of premium, didn't you?      A. Yes.

Q. In other words, you then charged the premium on the registration card for the first time in your department at the rates specified in the dailies which you had received in October of 1946?

A. That is correct.

Q. And you never at any time prior to May 1, 1947, entered any charge in your department against California Motor Transport Company on these policies, No. 20968 and 20950, at any rate other than those shown upon, or for any premium other than that shown upon the first four sheets of the registration card on Plaintiff's Exhibit 14?

Mr. Murman: To which——

A. Except the original entry.

Mr. Murman: To which I object unless the question is directed purely to the amount, not rate, because this witness already testified he paid no attention to the rate.

The Court: I think he can answer the question. The [149] question is whether prior to that time he had ever made any entry, premiums figure, at any rate other than that rate.

Mr. Murman: That is agreeable, to the rate.

A. That is, we entered it October 8, 1946, at the original entry.

Q. (By Mr. Eisner): What is the entry on October 8, 1946?

A. \$6,060 on policy SPL-20968, and then on policy SPL-20950 we entered \$6,685.40.

(Testimony of Charles Rechnagel.)

Q. What dates did you make those entries?

A. On April 8, 1946.

Q. On April 8, 1946, you made the entries of the deposit premiums? A. That is right.

Q. Those were the deposit premiums, then, you entered upon your records? A. That is right.

Q. Did you make any other entry upon your record upon October 6, 1946—April 6—

A. May 1.

The Court: This was in April, not September?

Mr. Murman: I think there is a misstatement there.

Q. (By Mr. Eisner): When did you say you made the entry of this deposit premium?

A. October 8, 1946.

Q. On October 8, 1946, did you make any other entry on your [150] records, on these policies, other than the deposit premiums? A. No, sir.

Q. Then on this registration card which you say was made on May 1, 1947, I call your attention to the heading, "Billed July 28, 1947."

A. Yes, sir.

Q. What does that mean? What is the meaning of that?

A. That means we billed Bayly, Martin & Fay on July 28, 1947, for \$5,950.52.

Q. Was that the first time, Mr. Rechnagel, that Bayly, Martin & Fay or anybody else have been billed for premiums in addition to the premium shown upon the first four ledger cards of Plaintiff's Exhibit 14? A. Yes, sir.



(Testimony of Charles Rechnagel.)

Q. Now, with reference to the last registration card that is a part of Plaintiff's Exhibit 14, that is also dated May 1, 1947, and shown as billed on July 28, 1947, and what you have testified regarding the fifth registration card is also applicable to this registration card—— A. That is correct.

Q. ——without repeating it?

A. That is correct.

Q. Are the bills made out in your department?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 13 and call your attention [151] to the bills that are a part of that exhibit, in addition to the bills to the California Motor Transport Company upon the letterhead of Fidelity and Casualty Company of New York, and——withdraw that.

Do you have copies of the bills to Bayly, Martin & Fay of February, 1947? A. No.

Q. They are billed by you, though?

A. Yes. We don't keep track of them.

Q. To whom are those bills sent?

A. They were sent to Bayly, Martin & Fay.

Q. Do you send any bill to the insured?

A. We do not.

Q. The only bill you send out is to the agent who does the collecting, is that it?

A. That is right.

Q. Did you receive any report from your department or Bayly, Martin & Fay after you sent out the bills of July 28, 1947?

A. The only statement we would have had—it

(Testimony of Charles Rechnagel.)

is now evident the item was put in suspense, so they must have reported before that to us they couldn't collect.

Q. Bayly, Martin & Fay reported back to you?

A. That is right.

Q. Did you send out any further bills to Bayly, Martin & Fay? [152] A. No, sir.

Q. After Bayly, Martin & Fay reported to you they couldn't collect, it was then, on November 7, 1947, the word "Suspense" was put on there?

A. Yes, sir.

Q. Is it your recollection Bayly, Martin & Fay reported they could not collect prior to November, 1947? A. That is right.

Q. Did you make any entry upon your records that Bayly, Martin & Fay reported they couldn't collect?

A. No, other than transferring this card to suspense. That would be on November 7, however.

Q. If Bayly, Martin & Fay, for example, reported to you in August of 1947 that they could not collect, did you make any entry upon your records at that time? A. No, sir.

Q. You simply disregarded it?

Mr. Murman: That is not the witness' testimony.

Q. (By Mr. Eisner): Well, did you send any further bills out?

A. No, we didn't send any further bills out.

Q. Have you any recollection as to in what month Bayly, Martin & Fay reported to you that the items were uncollectible?

(Testimony of Charles Rechnagel.)

A. It probably was in October.

Q. Of 1947? [153]           A. That is right.

Q. Now, then——

A. Because of the fact that the item was transferred in November to suspense.

Q. I call your attention to the fact that upon Plaintiff's Exhibit 14, the first four registration cards, there is marked on the first three "Audit March 15, 1947."           A. Yes.

Q. Was that payment made to your department?

A. No, sir, that was the date we posted it on our records.

Q. The check was received from Bayly, Martin & Fay——           A. Prior to that time.

Q. How long prior to that?

A. I can't tell here.

Q. Well, approximately.

Mr. Murman: That calls for a conclusion of the witness, Mr. Eisner.

Mr. Eisner: If he knows.

Mr. St. Clair: I object on the ground it isn't proper evidence; that is, it isn't a statement from this witness as to knowledge.

Mr. Eisner: I will ask counsel to produce anything you have by which they were remitted.

Mr. St. Clair: I have them.

Mr. Eisner: Let me have them, then. [154]

Mr. St. Clair: I am not sure they can be identified by this witness.

Mr. Murman: As I recall this witness' testimony,

(Testimony of Charles Rechnagel.)

he doesn't receive the money, he merely posted it on the registration cards.

Q. (By Mr. Eisner): Don't you receive the money? You are the cashier. Doesn't the cashier receive the money?

A. It comes into the accounts department.

Q. That is under your jurisdiction?

A. That is right.

Q. I call your attention, Mr. Rechnagel, to a check from Bayly, Martin & Fay to the Fidelity and Casualty Company dated January 28, 1947.

A. Yes, sir.

Q. Can you identify that check as one of the payments that were made and credited upon this registration card?

The Court: That is a check from Bayly, is it?

The Witness: Yes. Here is one of them, October 1, 1946, to November 1, 1946. The amount \$1,514.83 is right here.

Q. (By Mr. Eisner): In other words, the remittance that was credited, shown paid on March 15, was by check dated January 28?

A. That is right.

Q. 1947?

A. Then there is another item here. This amount. \$2,547.15, [155] is right here. That was for the audit September 1, 1946, to October 1, 1946.

Q. In other words, Bayly, Martin & Fay then remitted under the same check to you——

A. These two items.

Q. Well, so that we can identify them, the pre-

(Testimony of Charles Rechnagel.)

mium shown upon registration card first annexed as a part of Exhibit 14 covering the period from 9/1/46 to 10/1/46?      A. That is correct.

Q. Also the amount of the premium shown upon the second registration card, a part of the same exhibit, showing the premium 10/1/46 to 11/1/46?

A. That is correct.

Mr. Murman: May I suggest they be marked for identification, that particular check, so that we will have a record of it?

Mr. Eisner: Very well, we will mark it for identification.

Mr. St. Clair: There is attached to that check, your Honor, some documents that are pertinent bookkeeping entries that I intend to put in through my own witness. May we have the whole three or four documents marked so that they won't be separated?

Mr. Murman: Yes, I intended that they be marked.

(The documents were marked Defendants' Exhibit D for [156] identification.)

Q. (By Mr. Eisner): I show you a check dated January 31, 1947, from Bayly, Martin & Fay, and ask you if that remits premium.

A. That is right, pays that premium \$2,040.62.

Q. 11/1/46 to 12/1/46, shown on the third registration card, part of that exhibit?

A. That is right.



(Testimony of Charles Rechnagel.)

Mr. Eisner: All right, we will have it marked for identification.

(The check was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Eisner): I show you a check dated——

Mr. St. Clair: That is the check dated January 31, is that correct?

The Clerk: Yes.

A. This is the third check. This is a check, February 27, amount \$2,036 paid to the audit December 1, 1946 to January 1, 1947.

Q. (By Mr. Eisner): Being the fourth registration card, a part of Exhibit 14?

A. That is right.

Mr. Eisner: Let that be marked for identification, next in order.

(The check was marked Defendants' Exhibit F for identification.) [157]

Q. (By Mr. Eisner): And the next check——

Mr. St. Clair: Can we have the date of that?

The Witness: This check is March 28.

Mr. Eisner: 1947.

The Witness: This item, \$1,082.54, which is included in the check of March 28, should have been posted to 20968. However, we never got an audit in our department for that and when the item was—prior to the item being transferred to suspense it was posted to this card, \$1,082.54.

(Testimony of Charles Rechnagel.)

Q. (By Mr. Eisner): In other words, the check of \$961.61 dated March 28, 1947, covered the payment of premium from 9/1/46 to——

A. No, sir.

Q. ——from January 1, 1947, to January 19, 1947?

A. No, sir. You see, there is a report which was received by our office for \$1,082.54 covering the month's audit for which our auditing department never gave us the entry. Now, let's see; we can figure that out. This is for a period, I believe, from January 1 to December—to January 21.

Mr. St. Clair: 1947?

Q. (By Mr. Eisner): From January 1 to January 21, 1947?

A. Yes, I think that is right.

The Clerk: The fourth check is marked Defendants' Exhibit G for identification.

(The check was marked Defendants' Exhibit G for [158] identification.)

The Witness: That is the check of March 28, 1947.

Q. (By Mr. Eisner): You didn't send out any second bills in October of 1947, did you?

A. No, I don't—no, sir; not from the accounts department.

Q. Not from the accounts department?

A. No, sir.

Q. You are going to produce for me, if there are any, any ledger cards that were made out in

(Testimony of Charles Rechnagel.)

your department on policies 20950 and 20968 prior to February 15, 1947?      A. Yes, sir.

Mr. Eisner: I think that is all.

Cross-Examination

By Mr. St. Clair:

Q. I have a few questions I would like to ask this witness, your Honor. One thing I would like to clarify for the record, I notice that both you and Mr. Challburg refer to these documents, some of these documents, I believe Exhibits 12 and 13 and 11—11 is the one—I show you Plaintiff's Exhibit 11. You refer to those as bills. Now, Mr. Challburg did the same. When you use the word "bill," you don't necessarily mean you send a bill for money that has never been received by your company, though?      A. No.

Q. That is an interdepartmental use, isn't it?

A. That is right. [159]

Q. Actually, if I may judge from Plaintiff's Exhibit for identification D through G, the checks did appear from those defendants, the company had received the money before these bills were made out?      A. That is right.

Q. So that it is the receipt of money that starts your intra-company mechanism?

A. That is right.

Q. So this thing you sent Bayly, Martin & Fay was actually a confirmation of receipt of payment, isn't it?      A. That is correct.

Q. In your company practice when a notice of

(Testimony of Charles Rechnagel.)

cancellation was issued, did such a notice go to you, copy of it?           A. Yes.

Q. I show you Plaintiff's Exhibits 5 and 6, which purport to be—or that is a notice of cancellation that was delivered sometime—what is the date?

A. December 19, 1946.

Q. On December 19, or somewhere near there, 1946, you and your department did know that the policies had been canceled?

A. That is correct.

Q. Again, in the company practice, these moneys you received from brokers, what is your practice with regard to the length of time that brokers customarily use for turning the money over to you that they have collected from the insured? Is [160] there an informal practice?

A. Well, sort of informal, yes. Usually about 90 days.

Q. It would be from 60 to 90 days before you received the money?           A. Yes, sir.

Q. Strictly within your own company practice, then, the payment would not be in default until after a period of time had passed?

A. That is right.

Q. Then I ask you, so far as the deposit premium that was referred to is concerned, so far as your department is concerned, that wasn't yet in default, is that correct, that is, in December?

A. That is right.

Q. At the time you knew the policy was canceled,

(Testimony of Charles Rechnagel.)

then, and under your practice, that premium was not in default?      A. That is right.

Q. Then certainly under your practice—withdraw that. If you can answer this—I suppose it is self-evident—a premium based on gross receipts for the month of September, 1946, obviously couldn't be computed until sometime in October, could it?

A. That is right.

Q. So that you don't expect payment from the broker until 60 or 90 days after sometime in October? [161]      A. That is correct.

Q. So that these payments that you received on January 28, Defendants' Exhibits for identification D through G, were, so far as your department was concerned, timely payments, is that correct?

A. Correct.

Q. So far as the checks that went into evidence for identification only are concerned, attached to the checks are various pieces of paper, and annexed—I notice one of them is a standard Bureau form.

A. Yes.

Q. Do you know whether or not the defendant received a copy of that with the check?

A. We did.

Q. Where would that go to on interdepartmental procedure?

A. That would be in the accounts department and we would have the original of that.

Q. You would?

A. Yes, sir. It is quite evident that we had it on account of the payments.



(Testimony of Charles Rechnagel.)

Q. That is called standard Bureau Form 370?

A. That is right.

Q. Attached to this same check is a little more informal form, if I may call it that, that constituted an invoice, and it has a number. Do you know whether you received that [162] invoice attached to that check, or is that a record of Bayly, Martin & Fay?

A. I believe that must be the Bayly, Martin & Fay. We didn't get a copy of that. I doubt if we did.

Q. Can you from these documents marked for identification tell us whether or not you did receive this Form 370? Is there any way of refreshing your memory? You said——

A. It is quite evident we got—as a matter of fact, I think Mr. Murman has a copy of one of these now.

Q. As far as your best recollection is concerned, you testified you did receive the original of those forms? A. That is right.

Q. Again back to this matter of these bills, as you refer to them, I show you Plaintiff's Exhibit 11 and ask you to point out for the record and the Court, as a matter of fact those bills are made out to the insured, are they not? A. Yes, sir.

Q. They are not made out to Bayly, Martin & Fay? A. No.

Q. You meant, then, in your previous testimony that was not sent physically to Bayly, Martin & Fay? A. To be delivered to the office.

(Testimony of Charles Rechnagel.)

Q. But the bill, from your point of view, is to the assured? A. That is right.

The Court: I understood him to say those really aren't [163] bills, they are confirmation of payment.

Mr. St. Clair: I have fallen into the same bad habit, your Honor. They are not bills.

Mr. Murman: That is correct.

Mr. St. Clair: That is all the questions I have of this witness, your Honor.

Mr. Murman: I have just a few questions, your Honor.

### Redirect Examination

By Mr. Murman:

Q. While we are talking about that confirmation of payments, Mr. Rechnagel, they are confirmation of payments of amounts submitted on voluntary audits, isn't that correct? A. That is correct.

Q. They are not confirmation of payments?

Mr. Eisner: Just a moment. I object to counsel leading his own witness.

Mr. Murman: All right. Withdraw that question.

Q. Do those confirmation payments have anything to do with the final audit? A. No, sir.

Q. Referring again to the same general subject, that is, Exhibits D through G for identification, the checks, those are the—are those the payments you received before you sent out these confirmations of payment? A. Yes, sir. [164]

(Testimony of Charles Rechnagel.)

Q. And again, they refer to voluntary audits?

A. That is right.

Q. Had nothing to do with the final audit?

A. No, sir.

Q. You said that there were no deposit premiums collected. I believe you said that in answer to one of Mr. Eisner's questions? A. That is right.

Q. Also, in answer to Mr. St. Clair's question you said that cancellation notices had been sent out December 17, 1946?

A. I think that was the date, yes, sir.

Q. The deposit premiums were not in default on that date? A. That is correct.

Q. Does that explain why they were not collected?

A. So far as my records are concerned, yes.

Q. Regardless of the deposit premium, these postings made on Plaintiff's Exhibit 14 as to the first four ledger cards refer to receipts actually received by the Fidelity and Casualty people from Bayly, Martin & Fay on account of the assured, is that correct? A. That is right.

Q. And they were for the voluntary audits?

A. That is right.

Mr. Murman: I have no further questions.

Mr. Eisner: I have a couple of questions. [165]

Recross-Examination

By Mr. Eisner:

Q. Mr. Rechnagel, you have referred to final audits here. The final audit is nothing more than a check that is made of the records of the insured

(Testimony of Charles Rechnagel.)

by your auditing department to determine whether or not the insured has correctly reported his gross receipts; isn't that correct?

A. Yes, but also to determine that the correct rates were used and the classification of its payroll is correct.

Q. Just a moment. Mr. Rechnagel, do you mean to say that you wait until the final audit, which in this instance was in April of 1947, before a check is made to see whether or not the insured has reported his premium at the proper rate?

A. Yes.

Q. You mean to say if the regular premium was a dollar and the insured had reported his premium at a rate of 10 cents, that the first time your department would check the accuracy of the report and remittance of the assured was at the time of the final audit?

Mr. Murman: Objected to as argumentative and assuming something not in evidence.

The Court: I will allow the question.

A. My department wouldn't handle that in the first place. That is an auditing department matter.

Q. Is that the best answer you can give to that question, Mr. Rechnagel? [166]

A. That is correct.

Q. Now, Mr. Rechnagel, regarding the payments made to the brokers, or to your agent, I understand that you don't expect your agent to remit to the company for 60 or 90 days the money that the insured has paid to the broker on account of his premium?

(Testimony of Charles Rechnagel.)

Mr. St. Clair: I object to that question as calling for a legal conclusion of the witness. It assumes an agency that hasn't been proven and can't be proven by this witness.

The Court: Yes, it has that particular use of language.

Mr. Eisner: I will reframe the question, your Honor.

Q. Do I understand, then, that you do not expect the broker or the—who has placed the insurance, to remit to the company the premium that has been paid by the insured under 60 or 90 days after the broker has collected from the insured?

Mr. Murman: To which I object on the ground that what this witness expects is immaterial.

Mr. Eisner: It was part of your examination.

The Court: I will let him answer the question. He has already stated under questioning of Mr. St. Clair, without objection, that it was the practice to give 60 to 90 days' grace before those payments were made.

A. Well, we expect our agents to pay us their premiums when they collect them. However, they do not become overdue for 60 to 90 days. When I say "60 to 90 days," I mean this: The [167] September item actually has to be marked off my books on December 31, either by payment or cancellation.

Q. (By Mr. Eisner): You recognize the propriety of the payee, the party to whom the payment has been made, to retain the money for that length of time? A. Yes, sir.

Q. You have already testified regarding these



(Testimony of Charles Rechnagel.)

deposit premiums that it is the practice to bill the broker for these deposit premiums as soon as the policy is issued?      A. Yes.

Q. Then do I understand that where a policy calls for a deposit premium, that the company does not mark that deposit premium as delinquent until 60 or 90 days after the policy has been issued?

A. Yes, sir.

Q. Now, notwithstanding that the broker is billed for it?      A. That is right.

Q. Now, then, in this instance policy 20968, which is dated September 1, 1946, and called for a deposit premium, the deposit premium would be delinquent, according to your statement, on December 1, 1946?

A. It would become delinquent December 1, 1946, that is right.

Q. Because by that date you had not received remittance of the premium from the broker or agent, however you want to [168] designate him?

A. That is right. Yup!

Q. Then on December 1, 1946, did you make any demand upon Bayly, Martin & Fay for the payment of the deposit premium on policy 20946?

A. No, because——

Mr. St. Clair: Just a minute, Mr. Witness. My objection went to the prior question, but it assumes something not in evidence, that the policy was issued on December 1, 1946; the evidence showed the policy was issued in October, 1946, and this gentleman got it at that time. My objection runs to the line of questions that is based on an assumption of December 1, 1946.

(Testimony of Charles Rechnagel.)

Mr. Eisner: But the policy, if it ever became effective, the date it became effective was retro-active to September 1.

The Court: This witness already testified that the premium was in default on December 1, 1946. He might not be right about that, but anyway, he so testified, so the question whether he ever billed it at that time is immaterial.

Mr. Eisner: I think that is all.

The Court: It is twelve o'clock, gentlemen. This being law and motion day, we will take an adjournment until a quarter after two.

(Thereupon a recess was taken until 2:15 p.m. this date.) [169]

Afternoon Session, Monday, October 10, 1949

### CHARLES RECHNAGEL

resumed.

#### Recross-Examination

(Continued)

Mr. Eisner: I have some further questions.

Q. Now, Mr. Rechnagel, at my request you have produced the other ledger cards that you had covering these policies? A. Yes.

Q. Are these the other ledger cards that you have? A. Yes, sir.

A. They were made out and entered on my records November 1, 1946.

Q. When were they made out?

(Testimony of Charles Rechnagel.)

Q. And those ledger cards contain only a reference to the deposit premiums, is that correct?

A. That is right.

Q. What is the deposit premium set forth on that registration card for policy 20950?

A. \$3,127.01.

The Court: What?

The Witness: \$3,127.01.

Q. (By Mr. Eisner): How do you reconcile that with the deposit premium of \$6,685.40 contained in the policy? A. I can't.

Q. You can't? [170] A. No, sir.

Q. Well, Mr. Rechnagel, where did the figure \$3,127.01 come from?

Mr. Murman: If the Court please, I object to any further questions along that line because we are not asking of the defendant from this Court for the deposit premium. We are asking for the earned premium, the difference between the premium paid on voluntary audit.

The Court: I understand, but on the other hand, the position of the defendant would be, or is, that the policies were never put into effect, and this is a circumstance that bears on it.

Mr. Eisner: Exactly. You stated just exactly what I have in mind.

Mr. Murman: Well, all right, your Honor. I just wanted to make our position clear, that we are not trying to collect the deposit.

The Court: I understand that.

Mr. Eisner: We know that. Well, what was the question? I think there was an objection.

(Testimony of Charles Rechnagel.)

(Question read.)

A. I said I couldn't explain that.

Q. (By Mr. Eisner): Now, what is the deposit premium shown upon your ledger card for policy 20968? A. \$6,060. [171]

Q. I notice that the deposit for the amount of \$6,060 has been evidently changed.

A. That is right.

Q. Do you know what was originally entered in that? A. Same thing.

Q. How do you know that?

A. Because it was a ditto operation. Probably the figures were not legible to the bookkeeper at that time and she went over it with ink.

Q. That is the only figure upon that policy that shows in ink, is it not? A. That is right.

Mr. Eisner: We offer these registration cards in evidence as Defendants' exhibit next in order.

Mr. Murman: To which we make the same objection, incompetent, irrelevant and immaterial, not within the issues of the case.

The Court: All right, overruled on the same grounds.

(The cards were marked Defendants' Exhibit H in evidence.)

The Court: \$6,060, is that the original deposit shown in the policy?

Mr. Eisner: Yes, \$6,060.

The Court: Policy 20950 is different. 20968 was changed?

Mr. Eisner: As shown in ink.

Q. Do you know when that inking was done?

(Testimony of Charles Rechnagel.)

A. At the time the bookkeeper—well, it was done probably when the clerk was balancing it with the transmittal sheets, or the bookkeeper caught it and changed it.

Q. Mr. Rechnagel, showing you registration card No. 5 in Plaintiff's Exhibit 14, you have already stated that that was made out on receipt of the report from the auditor dated April 19, 1947, is that correct?

A. Yes, sir.

Q. The card was made out on May 1?

A. May 1, 1947.

Q. It was billed July 28, 1947, is that correct?

Q. Yes, sir.

Q. What was the reason for the delay in billing this additional premium between May 1, when the registration card was made out, and July 28, 1947?

A. That would be the normal date of billing. In other words, we would bill for the first time on July 28 our May business.

Q. Now, Mr. Rechnagel, I call your attention to the fact that if the insured owed \$5,950.52 additional premium, that additional premium was owed from the time at least of cancellation of the policy, wasn't it?

A. That is right.

Q. Notwithstanding you made out the registration card on May 1, 1947, you say it is normal business practice for you to wait until July 28, 1947, before you would send out the [173] broker?

A. Yes. I might add upon that, that on April 19 formal billing of our audited bill went to the agent, the broker, Bayly, Martin & Fay.

Q. In other words, upon April 19, 1947, did you



(Testimony of Charles Rechnagel.)

send to Bayly, Martin & Fay a copy of the auditor's report that is annexed as a part of Plaintiff's Exhibit 13?           A. Yes, sir.

Q. That went at that time to Bayly, Martin & Fay?           A. Yes, sir.

Q. You are sure of that?

A. In duplicate.

Q. In duplicate?           A. Yes.

Q. You are sure of that, are you?

A. Yes, sir.

Mr. Eisner: That is all.

Q. (By Mr. St. Clair): This may have been asked, your Honor, but I didn't get it. Mr. Witness, on Exhibit H there is the date November 1, 1946, is that correct?           A. That is right.

Q. It was your testimony that was the date it was made up?

A. That is the date this cleared the accounting department records.

Q. It was made up sometime in October, then? [174]           A. Yes.

Mr. St. Clair: That is all.

Mr. Eisner: One further question.

Q. What is the purpose of a deposit premium, Mr. Rechnagel?

A. You see, there are certain types of risks on which our company is unable to determine the actual premium. For instance, such a policy as this, and especially a more common one, compensation. Compensation policies or compensation insurance is based on a payroll basis. Of course, when we write

(Testimony of Charles Rechnagel.)

our policies, they go for a period of twelve months. We are unable to determine exactly what the premium on that particular policy is, so we write it on what we call an extended premium, and at the expiration of the contract the audit is made to determine what the actual premium is, and if the assured has paid us too much money at the beginning of the policy term, we give him a return premium.

Q. Isn't the purpose of the deposit premium in order that the company would be assured of payment by the insured and retain the deposit premium as security for its payment?

Mr. Murman: Objected to as argumentative. The witness already gave the explanation.

The Court: That is a conclusion of the witness, anyway. It is quite obvious.

Mr. Eisner: Yes.

Q. Mr. Rechnagel, this final audit that you have been [175] referring to, that is ordinarily made sometime after the term of the policy has expired?

A. Yes, sir.

Q. In other words, after the policy has run its term, then sometime after that the audit is made?

A. Yes, sir.

Q. And then, and only then, if the assured has overpaid by the deposit premium is a refund made to the assured?

A. Yes, sir.

Mr. Eisner: That is all.

(Testimony of Charles Rechnagel.)

Further Redirect Examination

By Mr. Murman:

Q. And if, after all, he has not paid a sufficiently large premium by the time the final audit is made, the assured is billed for the difference he is owing to the company, is that correct?

A. That is correct.

Q. And that is what was done here?

A. Yes.

Q. You said this morning, as I understand you, that the deposit premium became delinquent on December 1?

A. Yes, sir.

Q. By that did you mean there was a default on that date?

A. Oh, no, sir.

Q. What did you mean?

A. I meant that the premium became delinquent on December 1, and on December 31, that is, up to December 31 we would have [176] to either have our money or the policy would have to be canceled. I think I cited that as an example.

Q. So that in this case the premium, then, went on your books as a premium that was to be paid you on December 1, something that had to be paid between that date and December 31?

A. That is right.

Q. It would only be after December 31 you would attempt collection measures, is that correct?

A. That is right.

Q. In the meantime the notice of cancellation went out?

A. That is right.

Mr. Murman: I have no further questions.

(Testimony of Charles Rechnagel.)

Further Recross-Examination

By Mr. Eisner:

Q. One question: Mr. Rechnagel, you mean to say that if the policy calls for a deposit premium, that no effort is made to collect the deposit premium from the insured until after the policy is in effect for three or four months?

A. The company does not make any direct demands on the assured at all. We do it all through our agent and broker.

Q. Then I ask you this question: Do you mean to say that no effort is made to collect the deposit premium from the broker or through the broker——

A. Yes, surely.

Q. ——until after several months? In other words, the [177] practice is to have the broker collect the deposit premium immediately, isn't it?

A. That is right.

Q. When the policy goes into effect?

A. No. No.

Q. You are familiar with the fact that the California Motor Transport Company had this type of insurance from your company since the year 1941?

A. That is right.

Q. Each year each of those policies has called for a deposit premium? A. That is right.

Q. Isn't it a fact that each year as soon as the policy became effective the practice was for the deposit premium to be collected from the California Motor Transport Company immediately?

Mr. Murman: By the broker?

(Testimony of Charles Rechnagel.)

Q. (By Mr. Eisner): The money to be received by the company?

A. It might be paid to the broker, but I couldn't say whether it was paid to the company. I mean, I have to have records of that. I couldn't tell you when it is paid, whether it is paid immediately or not.

Q. Don't you get any report from your broker as to whether or not a deposit premium of six or seven thousand dollars has been paid by the insured? [178]

Mr. St. Clair: To complete the record, keep it straight, I object to the question.

The Court: This is your broker——

Q. (By Mr. Eisner): I say, from the broker.

A. Only when the policy premium—there was defaultation of it. In this particular case there was. I didn't come into the picture at all because the policy was made up before it really became—there was a default on the premium.

Q. Why, then, would you say it was an oversight that the broker in this—Bayly, Martin & Fay—wasn't immediately billed for the deposit premium?

Mr. Murman: I didn't understand he testified to that.

Mr. Eisner: Oh, yes.

Mr. Murman: I object to that, stating something not in evidence.

Mr. Eisner: I am not stating something not in evidence.

Mr. St. Clair: I join in that. I believe the testi-



(Testimony of Charles Rechnagel.)

mony was that his best recollection was that a bill was sent.

The Court: I don't remember the use of the word "oversight."

Mr. Murman: No, he didn't use it.

Q. (By Mr. Eisner): What was your testimony regarding the fact that any bill wasn't sent for the deposit premium?

A. I said to the best of my recollection it must have been billed. [179]

Q. Have you been able to find any bills?

A. We don't keep those.

Q. Don't you keep copies of bills?

A. No.

Q. Have you any knowledge of any deposit premium having ever been billed?

A. It must have been billed. It must have been billed in December, but I wouldn't swear that it was. The item was delinquent in December and so a bill must have gone out to Bayly, Martin & Fay.

Q. Didn't you say this morning in your testimony that so far as you knew, to the best of your recollection, the deposit premium was never billed?

Mr. Murman: That is not what he said.

Mr. Eisner: Well, I will ask him if it isn't. I am cross-examining. A. No.

Q. You didn't say that? A. No.

Mr. Eisner: I will let the record speak for itself upon that.

Mr. Murman: Are you through, Mr. Eisner?

Mr. Eisner: That is all.

(Testimony of Charles Rechnagel.)

Further Redirect Examination

By Mr. Murman:

Q. One question on this default business: [180] Mr. Rechnagel, when the account goes into default, as you said this would have December 31, would you at that time have proceeded against the broker or against the assured?

Q. As a matter fact, that is what happened to this case when you took the case over to our office, isn't that right? A. That is right.

Mr. Eisner: Oh, just a moment.

Mr. Murman: That is all.

Mr. Eisner: That is all.

Mr. St. Clair: No questions.

(Witness excused.)

Mr. Murman: May Mr. Rechnagel be excused?

Mr. St. Clair: So far as I am concerned.

Mr. Eisner: I may have some further questions. I don't want to keep him here——

The Court: He can be called back.

Mr. Eisner: All right.

HENRY R. CANTLEN

called for the plaintiff; sworn.

The Clerk: Will you please state your name.

The Witness: Henry R. Cantlen. [181]

Direct Examination

By Mr. Murman:

Q. What is your business?

A. I am with Bayly, Martin & Fay as vice president in charge of their San Francisco office.

Q. How long have you been with Bayly, Martin & Fay? A. Since 1946.

Q. Do you in your capacity as vice president and in charge of the San Francisco office have contact with clients of Bayly, Martin & Fay?

A. Yes.

Q. Is Bayly, Martin & Fay the third party defendant in this case? A. Yes.

Q. Did the clients of Bayly, Martin & Fay in the year 1946 include the defendants in this case, the California Motor Transport people?

A. Yes.

Q. How long had they been clients?

A. Well, through an affiliation of ours, Spengler & Johnstone, they were clients of our office when Spengler & Johnstone affiliated with the office in October, 1940.

Q. Was that the first time your organization had contact with the defendants in this case?

A. As Bayly, Martin & Fay, yes.

Q. Did you yourself act as a representative of

(Testimony of Henry R. Cantlen.)

the defendants [182] in this case in connection with their insurance problem?      A. Yes.

Q. In that connection you were the broker, is that right?      A. Yes.

Q. In 1941 did you contact the plaintiff in this case in connection with automobile insurance for the defendants?      A. In 1941?

Q. Yes.      A. Yes.

Q. And successively for each year thereafter up until 1946, which concerns us in this case, did you contact the plaintiff in this case in connection with insurance for the defendants right along?

A. Yes, I did.

Q. Did you have any instructions from the defendants in connection with placing insurance?

A. Did I have any instructions? What do you mean?

Q. Did they tell you what they wanted or did they leave it up to you on where to place the insurance and the type, and so on?

A. No, it is always done after consultation with the client.

Q. With whom did you consult?

A. Mr. James Coughlin.

Q. Who is Mr. James Coughlin?

A. President of California Motor Transport Company. [183]

Q. There are a number of defendants mentioned here. Is he in control of those various defendants, so far as you know?

A. I wouldn't know whether he is in control.

(Testimony of Henry R. Cantlen.)

Q. When you consulted with him, did you have your consultation in connection with him representing these other defendants mentioned?

A. Yes.

Q. In addition to the California Motor Transport Company? A. Yes.

Q. By the way, you know Mr. Mettalia, do you not, who appeared as a witness here?

A. Yes.

Q. Was it with him that you consulted when you talked with representatives of the Fidelity and Casualty people about the insurance?

A. No. I talked with him at times and he was in our conferences.

The Court: What is his name?

Mr. Murman: Mettalia; the first witness, your Honor. I see Mr. St. Clair has the original, your Honor, of the letter that I just gave Mr. Eisner the copy of to look at. I think we might as well use the original as long as he has it.

Mr. St. Clair: I would like to say this: This letter and the associated letters with it were taken by myself personally from the Bayly, Martin & Fay file, purely to [184] facilitate. Otherwise I would have to tear the file down now. That is exactly the way it was in the file.

Mr. Murman: We have the originals and some carbons. We can use the originals right along.

Q. Mr. Cantlen, I show the original of a letter dated April 18, 1946, addressed to Bayly, Martin & Fay on the letterhead of the Fidelity and Casualty



(Testimony of Henry R. Cantlen.)

Company of New York, and signed by Mr. Anderson as resident manager, and ask you if you remember receiving that letter?      A. Yes.

Q. Was that letter received by you in connection with your insurance dealings with the plaintiff on behalf of the defendants?      A. Yes.

The Court: What is the date of that letter?

Mr. Murman: Dated April 18, 1946. At this time I offer it in evidence as plaintiff's exhibit next in order, and I would like at this time to read the letter, the last paragraph, which is the one that is particularly pertinent.

(The letter was marked Plaintiff's Exhibit 15 in evidence.)

The Court: That is a letter from the plaintiff to Bayly, Martin & Fay?

Mr. Murman: Bayly, Martin & Fay, yes, sir. Maybe I had better read the whole letter. Maybe that will make it clearer.

(Reading Plaintiff's Exhibit 15.) [185]

This is the part that was pertinent. I really read the first part merely to give you the picture, your Honor:

"The failure of the Los Angeles representative or representatives of the insured to cooperate with us claimwise is difficult to understand and, of course, it is costing us money, which will be reflected in the premiums which the in-

(Testimony of Henry R. Cantlen.)

sured will be obliged to pay. Permit me to suggest that you again call the situation to the attention of Mr. Cross, or whoever is in a position to cause the situation to be corrected, and emphasize the advisability of a change of attitude on the part of the insured's Los Angeles representative."

Q. Now, Mr. Cantlen, when you got that letter did you call that matter to the attention of Mr. Coughlin?      A. Yes, I believe I did.

Q. In what way, or do you remember? In other words, did you do it by letter or verbally?

A. I think if I could refer to my file I could probably tell you exactly.

Mr. St. Clair: That is it you have there.

Mr. Murman: I am sorry; I didn't look through it (handing document to the witness).

A. Well, I called it to Mr. Anderson in my letter of the 22nd advising taking it up with the assured in San Francisco.

Q. I have here—pardon me. May I interrupt? I have the [186] letter of April 22.

A. Yes. Then I sent a copy of it. Here is my letter to Mr.—to the California Motor Transport Company.

Q. You sent a copy of the letter of April 18 to the California Motor Transport people?

A. According to this I did. It says so right there.

Q. Does that refresh your recollection that you did do that?

(Testimony of Henry R. Cantlen.)

A. Yes, I would say I did it if the letters contain that.

Q. I show you the original of the April 22 letter. I think you have already identified it as the original of one in reply to the April 18 letter, is that correct?

A. Yes, that is my signature.

Q. This copy of the letter of even date, you forwarded a copy of the April 18 letter to the California Motor Transport people, is that it?

A. That is right.

Mr. Murman: At this time I ask that these two letters be made a part of Plaintiff's Exhibit 15, since they all relate to the same incident.

The Clerk: I will staple them together.

The Court: What is the number? 15?

Mr. Murman: Yes, your Honor. I would like to read briefly from those letters, if the Court please. This is addressed to the Fidelity and Casualty Company of New York, Attention Mr. F. L. Anderson, dated April 22, 1946 (reading letter). [187]

Then the letter of even date to California Motor Transport Company, Attention Mr. J. C. Coughlin, President, dated April 22, 1946 (reading letter).

Q. You did receive a reply, did you not, Mr. Cantlen? A. I don't recall.

Q. I show you the original of letter dated, Fidelity and Casualty Company of New York, dated May 2, 1946, Attention Mr. Anderson, and signed by you, copy to Mr. Coughlin, and ask you if that refreshes your memory.

(Testimony of Henry R. Cantlen.)

A. Mr. Coughlin told me that personally, verbally.

Mr. Murman: I offer this in evidence as part of Plaintiff's Exhibit 15, since it refers to the same transaction.

The Court: What is the date of that letter?

Mr. Murman: May 2, 1946, your Honor. This letter reads, your Honor (reading letter).

The Court: Is all of that part of Exhibit 15?

Mr. Murman: Yes, your Honor. It all relates to the same matter.

Q. Now, Mr. Cantlen, you discussed this matter that is the subject of Plaintiff's Exhibit 15 with Mr. Coughlin orally as well as in writing, as you have just stated, is that correct?

A. To my best recollection, unless there is a letter in the file, I did gain that information, and in the absence of any letter I must have gotten it from him verbally. [188]

Q. I think you identified the last letter, May 2, as containing information that had been given to you verbally?

A. To my best recollection.

Q. At that time did your discussion relate to the increasing cost of insurance that the April 18 letter refers to that will be brought about by the conditions at Los Angeles if it wasn't corrected?

A. Well, that was a matter of constant discussion between us, because the matter of premium rates would be a matter of loss experience.

Q. Did you know that the loss experience of the

(Testimony of Henry R. Cantlen.)

Fidelity and Casualty people had increased percentage-wise particularly in connection with the policy that was in force at the time these letters were written?       A. Yes.

Q. I call your attention to Defendants' Exhibit BB, which is put in evidence on your behalf, and which relates to the loss ratio increasing 185 per cent over—or of a loss ratio of 185 per cent, and ask you whether or not that was the subject of discussion between yourself and Mr. Coughlin at any time?       A. Yes, we did discuss that.

Q. Did you tell Mr. Coughlin at any time before the policy which was then in existence had terminated that renewal of that policy would inevitably bring about an increase of premium rate? [189]

A. Yes.

Q. You did tell him that?       A. Yes.

Q. Did you tell him or was there any discussion—

Mr. Eisner: Just a moment. If there are any conversations I would like a foundation laid, if the Court please.

Mr. Murman: All right.

Q. Can you state, Mr. Cantlen, when such a discussion took place as to point of time?

Mr. St. Clair: That is the discussion referred to in Exhibit BB?

Mr. Murman: Yes.

Q. The discussion between you and Mr. Coughlin in relation to the ratio loss increase, that is referred to in Third Party Defendants' Exhibit BB?



(Testimony of Henry R. Cantlen.)

A. We had numerous discussions.

Q. When you say "numerous," how many times, offhand?

A. Oh, we started discussing this thing and the renewal along in July, 1946.

Q. Is that the first time, according to your best recollection, that there was some discussion between you and Mr. Coughlin as to an increase in rate, possible increase in rate, put it that way?

A. It may have been, yes.

Q. Well, when you say it may have been, you mean that is [190] your best recollection?

A. I would say so, yes.

Q. From that time on there were numerous discussions, is that right?

Mr. Eisner: Just a moment. If there are any conversations——

Mr. Murman: I am just asking him if there were other discussions from that time on, and we will hammer that down as nearly as we can.

Q. Were there other discussions from July, 1946, on?      A. Yes.

Q. What is your recollection as to the date of the next discussion?

A. Let's see. July. I would say around the first part of August.

Q. There is in evidence as one of your exhibits, Mr. Cantlen—or I should say Bayly, Martin & Fay's exhibits—Defendants' Exhibit CC, bearing date August 5, 1946. Would that refresh your recollec-

(Testimony of Henry R. Cantlen.)

tion as to about the time when the next discussion took place?

A. I would say it was shortly after this, but previous to this there was another discussion with Fidelity—after this letter, first there was another discussion took place with Fidelity and Casualty Company.

Q. After the letter of August 5, is that right?

A. That is right. He asked for certain information.

Q. In connection with the loss ratio, is that correct? A. Yes.

Q. Who did you talk to at that time with the Fidelity and Casualty?

A. Mr. O'Malley and Mr. Mettalia.

Q. After that you talked again with Mr. Coughlin, is that right? A. That is right.

Q. Can you approximate about when that was?

A. I would say it would have been possibly in the neighborhood of August 10th, somewhere in there.

Q. 1946? A. Yes.

Q. Was there anyone else present beside yourself and Mr. Coughlin?

A. No, I don't believe there was at that time.

Q. Did the discussion take place at Bayly, Martin & Fay's or California Motor Transport?

A. In Mr. Coughlin's office.

Q. In Mr. Coughlin's office in San Francisco, is that right? A. Yes.

(Testimony of Henry R. Cantlen.)

Q. In substance, can you tell us what was said at that particular conversation?

A. Well, I told Mr. Coughlin at that time that the Fidelity & [192] Casualty Company would only renew the policy on a retrospective basis, and at that time I explained to him the workings of a retrospective rating plan and that they were adamant, that they had instructions from the home office that in view of the general classification and the loss experience in that particular line that they were interested only in renewal on a retrospective rating plan.

Q. What was Mr. Coughlin's reply?

A. I explained—I had to explain the workings of the retrospective rating plan, and Mr. Coughlin wasn't—well, let's put it this way, he didn't like the idea or the workings of such a plan, so I told him I would go back and discuss it further with the company to see if we couldn't work out a guaranteed cost plan together. Well, at the same time, I explained to him we were attempting to interest other insurance companies to assume the business or take the business on on what we called a guaranteed cost plan, so I left Mr. Coughlin at that meeting, to my best recollection——

Q. This was in August, now?

A. That is right—that I would attempt further to have the Fidelity & Casualty Company consider the fee on a guaranteed cost basis, and also attempt to secure another market on a more attractive basis of a guaranteed cost basis.

Q. Did Mr. Coughlin, in that August 10th meet-

(Testimony of Henry R. Cantlen.)

ing, definitely tell you he would not consider insurance on the retrospective plan? [193]

A. No, he didn't tell me definitely, definitely tell me he didn't. He didn't like it that way.

Q. Did he tell you he wouldn't accept it that way?

A. There was no necessity for him to say.

Q. In other words, at that time you were not instructed not to place your insurance on any plan that involved a retrospective agreement, is that right? You had no instructions as to the retrospective agreement at that time?

Mr. Eisner: From whom are you speaking of?  
From Mr. Coughlin? A. No.

Q. (By Mr. Murman): You went back to F. & C. and talked to them, someone, is that right?

A. That is right.

Q. About when did that conversation take place?

A. I would say the latter part of August, to my best recollection; around August 25th, or somewhere in that neighborhood.

Q. Was that with Mr. Mettalia?

A. Yes. Yes, I believe it was. I think O'Malley was in on the conference, too.

Q. At that time did you have any conversation as to the insurance with the retrospective plan?

A. With who?

Q. With Mr. Mettalia.

Mr. Eisner: I think the conversation would be the best [194] evidence.

(Testimony of Henry R. Cantlen.)

The Court: First, he has to find out whether he had one or not.

Mr. Murman: Yes.

Q. Did you have any conversation with Mr. Mettalia regarding the retrospective plan at that time? A. Yes.

Q. Can you tell us what you told him?

A. My best recollection was that they again repeated, and they both repeated, that the company was still adamant and the home office would not consider the business only on the basis of the retrospective plan.

Q. Well, it was drawing near to the expiration date of the policy then in force, was it not?

A. Yes, it was.

Q. The SPL-1497, I believe, was the number of it, was expiring September 1st, 1946, isn't that right? A. That is right.

Q. With it would expire the filings with the Railroad Commission and the ICC, isn't that correct?

A. Yes.

Q. And Mr. Coughlin's business was such that he needed those filings, isn't that correct? Will you answer "Yes" or "No," please? I didn't hear you.

The Court: He said "Yes." [195]

A. Yes.

Q. (By Mr. Murman): What did you tell Mr. Mettalia about the insurance when you stated that he said the home office was adamant, that there must be a retrospective plan?

A. I told him that the assured was adverse to



(Testimony of Henry R. Cantlen.)

that form of plan and that we were still trying to get together rather—this was the latter part of August I told him that the assured disliked the idea of a retrospective plan, in view of the possible penalty, and that we were still trying to get the thing worked out and have a meeting, or have them get together, and he gave me a binder pending renewal.

Q. That is Defendants' Exhibit B?

A. Yes.

Q. What, if anything, was said about the filings?

A. And that they would file so that there would be no lapse of coverage.

Q. You knew at that time, did you not, that in order to file with the ICC and the Railroad Commission there had to be a policy number filed?

A. That is right.

Q. And that the filing was—that they wouldn't accept a filing that related merely to a binder? You knew that?

A. That is right. Well, I am not sure of that. No. I can't answer that point, whether they will accept the filing of a binder or insist upon a policy number. Mr. Mettalia could [196] answer that.

Q. Well, we have in evidence Plaintiff's Exhibit 2—

A. You asked me if I knew that they would, that Interstate Commerce Commission would accept a filing of a binder. I don't know whether they will or not.

Q. No, I asked about the Railroad Commission and the ICC. A. I don't know.

(Testimony of Henry R. Cantlen.)

Q. You don't know as to the Railroad Commission, either?      A. No.

Q. You are familiar with their form which provides for policy number?      A. Yes.

Q. This is Defendants' Exhibit 2 which provides a copy of the file, actually filed. Now, did you report that to Mr. Coughlin, the conversation you had with Mr. Mettalia?      A. Yes.

Q. What did he say?

Mr. Eisner: Fix the time, please, the foundation.

Mr. Murman: All right.

Q. Where did the conversation take place?

A. I delivered the binder to Mr. Coughlin.

Q. Was that before the expiration—

Mr. Eisner: Just a minute; let's get the date.

Mr. Murman: That is what I am going to ask.

Q. Is that before the expiration date of SPL-1547? [197]

A. I believe it was, to my recollection.

Q. So that would be before September 1st, 1946?

A. That is right.

Q. Where did you deliver the binder to him?

A. At his office.

Mr. Eisner: Did he say they delivered the binder or retrospective agreement?

Mr. Murman: The binder.

Q. Who else was there when you delivered the binder to him?

A. I don't recall anybody else being there.

Q. Was there any conversation about the binder

(Testimony of Henry R. Cantlen.)

and the insurance plan at that time? A. Yes.

Q. Can you tell us what was said?

A. I explained to Mr. Coughlin that the Fidelity & Casualty Company still were insisting upon the retrospective plan of insurance and that I was still unsuccessful in having them consider a guaranteed cost plan, and that we were continuing to attempt to secure or locate another market to offer to him, and continue our efforts with Fidelity & Casualty Company to have them reconsider the writing of it on a guaranteed cost plant, the rate to be agreed upon.

Q. Did you tell him about the company taking care of the filings that we have mentioned?

A. To my best recollection, I did. [198]

Q. You did? And what did he say as to that?

A. There was no particular comment. It was the customary procedure.

Q. By the way, had you been able to interest any other line in the risk up to that time?

A. No, I wasn't. Not at a—well, no, I wasn't.

Q. When were the policies received by you, Mr. Cantlen, referring to Plaintiff's Exhibits 3 and 4?

A. To my best recollection, it was the latter part of September.

Q. Had anything transpired between the time you delivered the binder to Mr. Coughlin and the time you received those policies?

A. Yes. What was that question again?

Q. I said, had anything transpired in between that time? A. Between what?

(Testimony of Henry R. Cantlen.)

Q. Between the time you delivered the binder to Mr. Coughlin and the time you received the policies, Plaintiff's Exhibits 3 and 4, in connection with this matter of insurance?

A. Had what transpired?

Q. Anything. Was anything done in between that time?

A. I was talking with other markets, and finally Mr. Metallia got hold of me and informed me that the policies would have to be written.

Q. Why? Did he give you any reason why they would have to be written? [199]

A. Yes, because the company was insisting upon the business being declared, and that if that—and that the retrospective agreement would have to be drawn and signed and the policies would have to be written.

Q. Did you communicate that to Mr. Coughlin?

A. I did right after the writing of the policies and the receiving by us of the retrospective agreement.

Q. And when was that?

A. Well, my best recollection would be we received these—it was the latter part of September or first part of October, and it would be immediately after that.

Q. At that time did you show the policies to him?

A. No.

Q. Well, where did the conversation take place, if there was a conversation?

A. With Mr. Coughlin?

(Testimony of Henry R. Cantlen.)

Q. Yes. A. In his office.

Q. What did you say to him and what did he say to you?

A. I explained to him that the Fidelity & Casualty insisted upon the declaration of the policies and the drawing of the retrospective agreement.

Q. When you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

Q. Well, in the business, you might carry the business under a [200] binder, and the declaration of the policy is declared on writing of the actual contracts.

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the policies being issued, they would supersede the binders?

A. That is right.

Q. So you told him the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?

A. Correct.

Q. What happened after that?

A. I again went over the workings of the retrospective plan and left the retrospective agreements with him, and he said he wanted to look them over and would probably have his attorney look them over, but he again reiterated that he would not be wholly satisfied with such a plan, and asked me if I couldn't interest a market, so I told him



(Testimony of Henry R. Cantlen.)

we were scouring the market to obtain a company that would write the business on a guaranteed plan in lieu of a retrospective writing plan.

Q. Up to that time, you had not been successful, is that right?           A. No.

Q. When you say "No," you mean you hadn't been successful?           A. That is right.

Q. This was in October, was it, or the latter part of September? [201]

A. No, this would have been in October.

Q. Prior to that time, Mr. Cantlen, were you aware of the fact that claims had been sent in to F. & C.?

Mr. Eisner: Pardon me; did I understand the latter part of October, Mr. Murman, the date?

Mr. Murman: No, early part of October.

Q. Were you aware of the fact that claims had been sent in to F. & C. by the defendants in this case, reporting accidents that had involved their vehicles?

A. I wouldn't necessarily have been aware of it because, under the system we had of reporting, the assured in this case reported direct to the insurance company.

Q. Well, I show you here a claim which shows the date of accident as September 1st, 1946, being a part of Plaintiff's Exhibit 9, in evidence, signed by Mr. J. H. Cross, Superintendent, California Motor Transport Company—do you know Mr. Cross, by the way?           A. Yes.

(Testimony of Henry R. Cantlen.)

Q. He is Superintendent, or was at that time?

A. Yes.

Q. —on which the Fidelity & Casualty Company paid a settlement figure or claim of \$59.74 under Policy SPL-20968, and ask you whether or not that was sent in directly to the Fidelity & Casualty Company or through your office?

Mr. Eisner: Just a moment. What do you mean? You have [202] asked a conglomeration of questions. You have asked whether the Fidelity paid that policy under—paid that loss under a certain policy.

Mr. Murman: No, I am asking him to identify it, and asked him whether it was sent through his office or directly by the defendant.

Mr. Eisner: You mean the claim itself?

Mr. Murman: That is correct.

A. To my best recollection, this went direct to the insurance company, and did not go through our office.

Q. Well, Mr. Cantlen, according to your best recollection, was the general practice that of going direct and not through your office? A. Yes.

Q. So the exception would be for it to go through your office? A. Yes.

Q. Then, I will show you Plaintiff's Exhibit 9, which has been identified as claims reported to the F. & C. through the San Francisco office of the F. & C., and ask you to look through there and tell us which, if any, of those claims were reported through your office.

The Court: While he is doing that, we will take a

(Testimony of Henry R. Cantlen.)

short recess.

(Thereupon, a short recess was taken.)

Q. (By Mr. Murman): You have finished, have had a chance to [203] look through Plaintiff's Exhibit 9?

A. Yes.

Q. Have you found any, Mr. Cantlen?

A. Just one here where we had one.

Q. Just one out of the group is all you were able to find, is that correct?

A. Yes.

Q. What is the date of that accident, as shown by the file?

A. The date of the accident?

Q. Yes.

A. October 25, 1946.

Q. Do you recall the circumstances of that matter being reported through your office, Mr. Cantlen?

A. Well, the reason that we had some knowledge of it was that I see a copy of a memorandum our office sent, sending a report to the Fidelity & Casualty Company.

Q. Is that a claim on a property damage and/or personal damage or a bond, or do you know?

A. This fellow had a thumb lacerated.

Q. Oh, yes. So it was a combination claim, a "P.D.," as well as "P.L.," as the saying goes?

A. Yes.

Q. This came to you, then, from the defendant in this case, the assured?

A. What came? [204]

Q. This file.

A. No.

Q. This claim.

A. We didn't have the claim. The claim was reported to the insurance company direct.

Q. Direct?

A. Correct.

(Testimony of Henry R. Cantlen.)

Q. I thought you said it had gone through your office?

A. I said we had knowledge of it because the complaint was served on the assured, which in turn forwarded it to us, to our office, and transmitted it to the insurance company.

Q. It was transmitted by you to the insurance company under Policy No. SPL-9068 and SPL-20950, is that correct?

A. That is correct.

Q. Those are the policies in question in this case?

A. That is right.

Mr. Murman: If the Court please, I wonder if we could take from Plaintiff's Exhibit 9 this one file, identified by the witness, and separately mark it in some way so that we don't lose track of it, otherwise it is liable to get back in this pile of claims and we will lose it.

The Court: I have no objection to your marking it as exhibit next in order, which would be 16, I think.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(The document was marked "Plaintiff's Exhibit 16," in evidence.) [205]

Mr. Murman: Let the record show that is taken from Plaintiff's Exhibit 9 and identified by the witness as one that his office had knowledge of.

Q. Isn't that correct, Mr. Cantlen?

A. Yes.

Q. Now, Mr. Cantlen, as to these voluntary audits which are Plaintiff's Exhibit 10, starting with the one on September, 1946, and going along

(Testimony of Henry R. Cantlen.)

for successive months, were those prepared in your office?      A. Yes, they were.

Q. What information did you receive in connection with the previous audit?

A. We received vouchers, checks, and vouchers, from the assured, which contained these reports, gross receipts reports, and we would process them in our office, make up the statements and forward them on to the insurance company.

Q. Having in mind this first gross receipt report, dated September, 1946, have you any knowledge as to when you received the information as to the gross receipts on which the report is based from the insurance company—from the defendants, pardon me?

A. I couldn't tell from here, but if I could have my file I think I could probably tell. You want to know when——

Q. (Handing document to the witness): When you received the information upon which the gross receipts report of September, [206] 1946, is based.

A. Well, it was previous to January 27th because that is the date we sent them to the insurance company.

Q. But can you tell us approximately when, prior to that time, it was received by you?

A. I couldn't tell you the exact date.

Q. Is there any way to approximate it? In other words, would it have been in October, November, December?      A. For September and October?

Q. For September?



(Testimony of Henry R. Cantlen.)

A. September? No, sir, it wouldn't come to us until, I would say, the latter part of October.

Q. Latter part of October?

A. That would be maybe the first part of November.

Q. Is it a fair statement, then, Mr. Cantlen, to say that the information for one particular month arrived in your office about thirty days late, or thirty days after that month? A. Yes.

Q. That was the general procedure, is that correct? A. That is right.

Q. That would apply, then, to each one of these reports, September, October, November, December, and January 1st to January 17th, 1947, is that correct? A. Yes, I would say so.

Q. Can you tell the court whether you asked for this information [207] from the assured, or did it come to you as a routine procedure?

A. Routine procedure.

Q. How much of the information came to you, referring, as an example, to September, 1946, and the information appearing in the column under "Revenue," come to you from the assured?

A. Well, here it is right here on the typed voucher, shows you how it would be reported. It is under "P.L." and "P.D." insurance and revenue and rate.

Q. In other words, that report not only shows in the revenue column, but also a figure showing under the primary public liability rate and under property damage?

(Testimony of Henry R. Cantlen.)

A. No, they show a combined rate.

Q. Did you break it down, then? A. Yes.

Q. What you would get from them, then, was the revenue and the two rates combined into one?

A. Here it is right here (indicating).

Q. When you say "here," are you referring to your file?

A. This was a copy. This is the voucher, the vouchered portion of the check.

Q. Was that information accompanied by a check from the assured to you, then? A. Yes.

Q. Payable to you? [208] A. Yes.

Q. I see. And this was an explanation, then, as to the amount of the check, is that right?

A. That is right.

Mr. Eisner: It was part of the check, attached to it.

Q. (By Mr. Murman): Attached to it and explaining the check itself?

A. It says, "Please detach this statement for deposit."

Q. You took that information furnished by the assured, put it on the form we have in evidence, and sent it to the company? A. That is right.

Q. So all you did with the accident was its transmittal?

Mr. Eisner: Just a moment; that is calling for a conclusion of the witness.

The Court: I believe so.

Q. (By Mr. Murman): Well, did you do anything in furnishing this information to the company,

(Testimony of Henry R. Cantlen.)

to the insurance company, other than taking the information from the voucher furnished you by the insured, and putting it on this form?

A. Well, we had to combine it here. We have it for various companies, Sunset Transfer, Coastwise Express, various haulers, Red Line Transfer Company. We combine it on this form, broke it down into the subsidiary companies on individual company revenue, rates, develop the premium, and send it to the company.

Q. So that the check sent to the insurance was no different [209] from what you received, except you had changed the form of it?

A. What is that again?

Mr. Murman: May I have the question read?

The Court: I think it is pretty clear to see what he did. He had this combined statement submitted, covering various companies, various insurance policies, and various rates, and he breaks it down to the particular fidelity and deposit company and sends his breakdown with his check for that particular amount.

Mr. Murman: Yes.

The Court: And his statement.

Mr. Murman: Yes, that is correct.

Q. That was done on each one of the months shown on these gross receipts reports?

A. Yes.

Q. Now, Mr. Cantlen, after you received the policies from the Fidelity & Casualty people, did you show them to Mr. Coughlin?

A. No.

(Testimony of Henry R. Cantlen.)

Q. At the time you had this discussion with him early in October, as you stated, concerning the company wanting the policies to be declared, you had them in your possession then?

A. They were in my office.

Q. You didn't take them over to Mr. Coughlin, though? A. No.

Q. Did you tell him you had them in your office? [210] A. I believe so.

Q. What you did take over to him, as I recall your testimony, was the retrospective agreement, which is Defendants' Exhibit C, is that correct?

A. That is correct.

Q. Did you point out to him at that time that the retrospective agreement referred to a definite policy, No. SPL-20968?

A. I don't recall that I was that specific.

Q. But you did leave it with him? A. Yes.

Q. Now, Mr. Cantlen, did you receive a cancellation notice that the company sent out in connection with these policies?

A. We received a copy of it.

Q. You received a copy? Did you deliver the copy to the assured or discuss the copy with the assured at all?

A. Yes, after they were served, we discussed it, and there was thirty days for it to become effective.

Q. Did you also receive notice of cancellation of filing with the Railroad Commission?

A. No, not to my knowledge.

(Testimony of Henry R. Cantlen.)

Q. Do you know—did you have any discussion with Mr. Coughlin about the cancellation with the Railroad Commission?

A. I don't think any particular conversation.

Q. You don't recall any at this time?

A. No. [211]

Q. Do you recall having received copies of Plaintiff's Exhibit 13, which refers to the statement of adjusted premium, or contains the statement of adjusted premium to the California Motor Transport Company, naming Bayly, Martin & Fay the broker, dated April 19, 1947, and referring, first, to SPL-20950, and, secondly, SPL-20968?

A. Yes, we received those.

Q. What did you do when you received those copies, other than perhaps filing them in your records?

A. When I received them, I immediately got in touch with the company—

Q. Which company, now?

A. Fidelity & Casualty Company—and questioned the rate that was charged for the primary automobile coverage in these audits.

Q. Was there some difference between that rate and the rate in the policies?

A. No, it was the same rate.

Q. Did you send out any bills to the defendants?

A. No. I did in August, August 6th these bills were made up.

Q. August 6th of what year? A. 1947.

Q. Were those bills then sent to the company at that time, August 6th?



(Testimony of Henry R. Cantlen.)

A. Sent to California. [212]

Q. I mean to the California Motor Transport Company.

A. No, they were not delivered to them until, I believe it was—can I again look at my file?

Mr. Murman: I believe that will be all.

Mr. Eisner: Let the witness answer the question you asked, first. He said he wanted to look at his file.

Q. (By Mr. Murman): I thought this might refresh your recollection. I have a copy of a letter dated August 7, 1947, addressed to the California Motor Transport Company, Ltd., apparently signed by you, Mr. Cantlen, copy sent to the Fidelity.

Mr. Eisner: Why not let the witness examine his file and answer the question?

Q. (By Mr. Murman): And I ask you if that refreshes your recollection?

A. Yes; this was written in August, but it wasn't delivered to the assured until some time in October.

Mr. Murman: Have you seen this, Mr. Eisner?

Mr. Eisner: Yes, I have.

Mr. Murman: All right, I will offer this in evidence as Plaintiff's exhibit next in order, if the Court please. It is dated August 7, 1947, but the witness stated it was not delivered until October.

(The document was marked "Plaintiff's Exhibit 17," in evidence.)

Mr. Eisner: Suppose we give you the original of that, [213] counsel, so you can introduce the original of that letter.

(Testimony of Henry R. Cantlen.)

Mr. Murman: Well, that is all right. If you have it handy, I would be glad to, and we will withdraw the copy. Do you have a reply to it?

Mr. Eisner: I would like to read it at this time.

Mr. Murman: I will read it. It is our exhibit.

Mr. Eisner: All right.

Mr. Murman: At this time, with the Court's permission, I will read the letter. (Reading Plaintiff's Exhibit 17.)

Q. That letter, I take it, then, Mr. Cantlen, was a covering letter not only of the invoices but the policies, as well? A. Yes.

The Court: What is the date of that letter?

Mr. Murman: August 7, 1947, but I believe the witness stated, Your Honor, it wasn't delivered until October.

Q. Is that what you said? A. Yes.

Q. Did you receive a reply from the California Motor Transport people to that letter?

A. Yes.

Q. Do you have it there? A. Yes.

Q. May I have it, please?

Mr. St. Clair: Somebody served a demand on us for that letter, although I have forgotten who.

Mr. Murman: I believe it was Mr. Eisner.

Mr. Eisner: Yes, I did.

Q. (By Mr. Murman): You have showed me a letter, Mr. Cantlen, under letterhead of the California Motor Transport Company, Ltd., dated October 22nd, 1947, addressed to Bayly, Martin & Fay, attention yourself, and signed by Mr. W.

(Testimony of Henry R. Cantlen.)

J. Davis, Assistant Secretary, per somebody. Is that letter in reference to when you said you received a reply?      A. Yes.

Mr. Murman: At this time, if Your Honor please, we will offer the letter in evidence as plaintiff's exhibit next in order.

(The document was marked "Plaintiff's Exhibit 18," in evidence.)

Mr. Murman: At this time, I ask leave to read the letter identified by the witness, now Plaintiff's Exhibit 18. (Reading Plaintiff's Exhibit 18.)

Q. Now, Mr. Cantlen, did you acknowledge that letter from the California Motor Express people—Motor Transportation Company? I have here what purports to be a copy of the original, and ask you if that is such a copy?

Mr. Murman: Do you have the original, Mr. Eisner?      A. Yes.

Mr. Eisner: No.

Mr. Murman: Then, you would like to look at that, I suppose? [215]

Mr. Eisner: Yes, I would. We have no recollection of ever having received any copy. If the witness can testify, to his knowledge, it was mailed or sent. I notice there is at the bottom of it a line "Copy." I don't know what that is.

Mr. Murman: That is to us.

A. Here is my copy, Mr. Eisner; my copy of the letter, together with a letter I received from—the insurance company wrote me certain facts, and I transmitted them to the assured.

(Testimony of Henry R. Cantlen.)

Q. (By Mr. Murman): You quoted from our letter?

Mr. Eisner: We have no recollection or record of having received that letter. If you can testify it was sent, to your knowledge——

A. To my best knowledge.

Mr. Eisner: But we have no record of it and I have never seen it before. I don't know whether it was mailed or not.

Q. (By Mr. Murman): So far as you can recollect, Mr. Cantlen, was this letter, of which the exhibit is a copy, mailed to the California Motor Transport Company, and was it about the date of the letter?

A. To my best recollection.

Mr. Murman: At this time, we will offer it in evidence as plaintiff's exhibit next in order.

(Document was marked "Plaintiff's Exhibit 19," in evidence.)

Mr. Murman: At this time, with the permission of the [216] Court, I will read it to the Court. (Reading Plaintiff's Exhibit 19.)

The Court: Who is that addressed to?

Mr. Murman: That is addressed to the defendants, Your Honor, November 12th, 1947.

A. He should have it.

Mr. Murman: It carries in the lower left-hand corner: "Blind copy, Fidelity & Casualty Company of New York, attention Mr. Metallia."

I have no further questions.

Mr. Eisner: I am going to have rather an extended examination of this witness, if the Court please.

The Court: Well, if that be the fact, I have to leave here early today; in five minutes, as a matter of fact. That case that was going on tomorrow, that criminal case, I am informed the jury has been waived, so I have asked them to wait until this is finished and then go on. The Clerk says we have assured that criminal case—they have witnesses from New York—that they will go on definitely on Wednesday, and if you can't finish this by tomorrow we will have to go over to some unforeseen time.

Mr. Murman: This is my last witness.

Mr. Eisner: I shall only have Mr. Cantlen and two other witnesses. I think we should be able to finish tomorrow.

The Court: How about you, Mr. St. Clair? [217]

Mr. St. Clair: Obviously, they are stealing my thunder by putting Mr. Cantlen on. I suspect by the time they get through I will have just piecing together.

The Court: In view of the fact that this has been broken into, I would like to have some arguments made.

Mr. Eisner: We will be glad to do that. We can close the testimony tomorrow, and the Court could fix a time that will be convenient, or if we have time tomorrow, if satisfactory.

The Court: We will try to work out a time.



Mr. Murman: It might be helpful to the court if we filed short written memorandums on the matter. Whatever the Court wishes.

The Court: It doesn't make any difference to me. Maybe we can start at a quarter to ten tomorrow.

Mr. Eisner: Very well.

(Thereupon, this cause was adjourned to 9:45 o'clock a.m.) [218]

October 11, 1949—9:45 o'Clock A.M.—Tuesday

HENRY R. CANTLEN

a witness called on behalf of the plaintiff, being previously sworn, resumed the stand and testified further as follows:

### Cross-Examination

By Mr. Eisner:

Q. Mr. Cantlen, you had a discussion pertaining to Policy No. 1457, which would expire September 1st, 1946, with Mr. Coughlin some time in July, 1946?

A. Yes, as I recall, we had a discussion. It indicated that the experience was unfavorable—a preliminary discussion.

Q. Do you recall Mr. Davis being present at a conversation in Mr. Coughlin's office, whereat you and Mr. Coughlin were present, in July or August of 1946, in which the matter of the renewal of Policy 1457 was discussed?

(Testimony of Henry R. Cantlen.)

A. It seems to me that Mr. Davis was at the meeting that took place the latter part of August.

Q. Mr. Cantlen, do you recall that at that conversation, the latter part of August, that Mr. Coughlin told you that he would not be willing to renew the policy at any higher rate of premium than contained in Policy No. 1457.

A. No, I do not.

Q. Do you remember that Mr. Coughlin told you at that conversation that if there was any increase in premium he would place the insurance with the Transport Insurance Exchange, [219] in which he was interested?

A. No, he did not.

Q. Did you know he was interested in the Transport Insurance Exchange?

A. Yes, we had some conversations concerning it.

Q. Do you recall in the same conversation Mr. Coughlin told you that the insurance company had in June, 1946, received what was the equivalent of a 19 per cent increase in premium because the California Transport Company and their affiliates had then obtained a 19 per cent increase in transportation rates, which would increase their gross receipts by that percentage?

A. Yes, I recall something to that effect.

Q. You recall that?

A. Yes.

Q. Do you recall Mr. Coughlin also told you in that conversation that a further increase of rates of transportation was being applied for, and which, if granted, would further increase the insurance premium paid on the basis of the rate contained in Policy 1457?

A. He may have said that.

(Testimony of Henry R. Cantlen.)

Q. When were you first told by Mr. Metallia or Mr. O'Malley that Fidelity would only renew the insurance on a retrospective arrangement?

A. It was first mentioned in our meeting the early part of July.

Q. Well, was the information definitely furnished you in the [220] early part of July that only a retrospective arrangement would be considered, or was the definite information given you at some later time by Fidelity?

A. At a later date.

Q. When was the definite information conveyed to you by Fidelity that the Fidelity would only consider renewal of the insurance policy on a retrospective arrangement?

A. They told me at a meeting that took place about the middle of August—August, August 15th, they indicated that definitely—not definitely, but that the home office were insisting upon the renewal of this contract on a retrospective basis.

Q. Did you thereafter see Mr. Coughlin?

A. Yes, I did.

Q. How long after August 15th, according to your best recollection?

A. According to my file, it was about August 27.

Q. At that meeting at which you saw Mr. Coughlin, did you express to Mr. Coughlin the significance of a retrospective arrangement, what such an arrangement would entail and mean?

A. Yes, I did, sir.

(Testimony of Henry R. Cantlen.)

Q. Did you tell him at that meeting that Fidelity was insisting upon renewal of the insurance upon a retroactive arrangement? A. Yes, I did.

Q. I understood you to say he expressed himself as not being [221] pleased with the idea of a retrospective arrangement? A. He did.

Mr. Murman: Was there an answer to that?

A. Yes.

Q. (By Mr. Eisner): Thereafter you took the matter up with Mr. Mettalia and Mr. O'Malley again, both told you that the company was adamant and that the home office would only consider the business on the basis of a retroactive plan, is that true? A. That is true.

Q. Approximately when was it that Mr. Mettalia or Mr. O'Malley gave you that information?

A. The ultimatum, definite ultimatum, came just prior to the time that the policies were issued, so that would have been in the neighborhood of September 22nd or 23rd.

Q. 1946? A. That is right.

Q. At that same meeting in which Mr. Mettalia and Mr. O'Malley told you that the company was insistent and adamant, did you tell Mr. Mettalia that Mr. Coughlin was opposed to the retrospective plan and the possible penalty involved, but that you were still trying to work it out and get together with him?

A. Yes, I told him the assured was not in favor of the plan.

Q. At that same meeting—withdraw the ques-

(Testimony of Henry R. Cantlen.)

tion. At what meeting was it that Mr. Mettalia told you that the Fidelity [222] would give you a binder pending renewal and would file with the ICC and Railroad Commission?

A. To my recollection, that was at a meeting of August 15th.

Q. As nearly as you can recall, were those the words of Mr. Mettalia?

A. I can't recall his exact words, but it is customary in our business that we have extension of coverage pending a renewal, so I undoubtedly requested he issue a binder pending the renewal of the policy and do the necessary filings with the Commissions.

Q. Did you, in fact, receive the binder, Defendants' Exhibit B, from Mr. Mettalia or Mr. O'Malley approximately on August 27, 1946, showing you that exhibit? A. I received this binder, yes.

Q. Did you receive it about upon the date August 27th, 1946?

A. Undoubtedly it was, because the binder is dated as issued as of August 27th.

Q. Now, Mr. Cantlen, do you have in your possession a copy of a letter that you wrote to Mr. Coughlin on August 27th, 1946, purporting to enclose this binder? Will you look in your file, please? You were given notice to produce that letter, a copy.

A. Wasn't that introduced in evidence yesterday?

Q. No. A. Yes, sir.

Q. Will your produce it, please? This is a copy



(Testimony of Henry R. Cantlen.)

of a letter [223] written by you as Vice President of Bayly, Martin & Fay, to the California Motor Transport Company, on August 27th, 1946?

A. Yes.

Mr. Murman: May I see it?

Mr. Eisner: Yes.

Q. (By Mr. Eisner): I understood you yesterday to say that you brought the binder with you personally to Mr. Coughlin, is that your recollection?

A. That is my recollection.

Q. And today, is it your recollection that, instead of mailing this letter, you brought the letter with you personally, with the binder, and delivered it to Mr. Coughlin?

A. That is possible.

Mr. Eisner: We offer this letter in evidence as Defendants' exhibit next in order.

(The document was marked "Defendants' Exhibit I," in evidence.)

Mr. Eisner: I will read this letter, if the Court please.

(Reading Defendants' Exhibit I.)

Mr. St. Clair: Pardon me, but attached to that letter as it came from the file is a copy of the binder. That is already in evidence.

Mr. Eisner: I will detach the binder, then.

Mr. Murman: No objection to that.

Mr. St. Clair: Thank you. Put that back in the file, Mr. Witness, in its proper place. [224]

Q. (By Mr. Eisner): Now, at the time you received this binder and delivered it to Mr. Coughlin,

(Testimony of Henry R. Cantlen.)

did you know how long the negotiations for renewal would take?      A. No, I didn't.

Q. The binder recites that it is for sixty days. Did you observe that?      A. Yes.

Q. The negotiations for the renewal of the policy took a great deal more than sixty days, did they not?

A. Yes.

Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity, pertaining to an extension of time on the binder?

A. No.

Q. Why not?

A. Because the binder was replaced by policies as issued.

Q. Well, Mr. Cantlen, you didn't say anything to them about the extension of the binder, you are quite sure of that?

A. Just what do you mean, Mr. Eisner?

Q. I mean, the binder originally states it was for sixty days.      A. Right.

Q. You notified Mr. Coughlin that this binder would be his comprehensive policy and his coverage pending renewal, didn't you?      A. Yes. [225]

Q. Your negotiations for renewal, you say, extended over the sixty-day period?

A. Well, they were still—now, the negotiations closed with the Fidelity & Casualty as of September 24th, the issuance of the policy. Now, that wouldn't necessarily mean, if I may explain, that negotiations could not continue. We could still endeavor to im-

(Testimony of Henry R. Cantlen.)

prove the situation or change the situation, regardless of the issuance of the contract.

Q. Mr. Cantlen, it wasn't until early October that you received the policies from Fidelity, is that correct?

A. It was some time just shortly after September 24th.

Q. At the same time you received the retrospective agreement? A. Yes.

Q. That was handed to you at the same time?

A. Yes.

Q. And then you have testified that you took up with Mr. Coughlin the question of whether or not he would be agreeable to the retrospective agreement? A. Yes, sir.

Q. And thereafter, and some time in October, the company officials told you that the company was adamant and insisted upon the retrospective agreement?

Mr. Murman: Objected to on the ground that that is not the evidence.

Q. (By Mr. Eisner): What is the fact, Mr. Cantlen? [226]

A. Well, it was just prior to September 24th, the issuance of the policies, that Mr. Mettalia delivered his ultimatum to me.

Q. Did you ever tell Mr. Coughlin that the binder would terminate or was terminating at the expiration of sixty days?

A. I don't know if I told him exactly that the binder—the binder spoke for itself.

(Testimony of Henry R. Cantlen.)

Q. Well, Mr. Cantlen, at the time you delivered this binder to Mr. Coughlin, you told him that the Fidelity still insisted upon the retrospective plan, but that you were still endeavoring to get a guaranteed rate and for negotiating with Fidelity and also other companies, isn't that true?

A. That is true, sir.

Q. You had been renewing the California Motor Transport Company's public liability coverage for several years, had you not?      A. Yes, sir.

Q. Had you ever before had a binder issued for the California Motor Transport Company?

A. I would have to refer to my files, Mr. Eisner. I don't know.

Q. Well, what is your best recollection upon that matter?

A. Well, we may or may not, depending on when the renewal policies were issued.

Q. According to your best recollection, is it a fact that in all prior instances the renewal policies were issued and delivered to the insurance prior to the expiration date of the [227] old policy?

A. That may be——

Mr. Murman: Objected to as argumentative.

The Court: Overruled.

A. That may be true, because we were able—well, that may be true.

Mr. St. Clair: Well, the witness can explain.

A. I would like to qualify it, if I may.

Q. (By Mr. Eisner): If you want to qualify the answer, you may.

(Testimony of Henry R. Cantlen.)

A. That is possibly true, because since 1941 this was the first renewal in which rate increase was involved.

Q. Notices had to be given to the ICC and the Railroad Commission to satisfy these bureaus that there was insurance coverage for the transportation company, is that true? A. Yes, sir.

Q. Which, in giving this notice, the coverage was indicated by policy numbers, although no policies had been issued or agreed upon at the time those numbers were given, is that true?

Mr. Murman: Objected to as complex. "Issued or agreed upon." That is a complex question.

Mr. St. Clair: I object to it on the ground it isn't within the cross-examination. It wasn't within the direct examination.

The Court: You will have to modify it.

Mr. St. Clair: All right. [228]

Q. (By Mr. Eisner): On August 27th, 1946, when you wrote this letter to California Motor Transport Company—

Mr. Murman: Is that Exhibit I, Mr. Eisner, just so the record is clear?

Mr. Eisner: Yes, Exhibit I.

Q. —had any policies been issued at that time?

A. No, sir.

Q. You are familiar with the notice and the fact the notice had been given to the ICC and the Railroad Commission prior to the time of the date of your letter of August 27th, 1946, is that correct?

A. That is possible.



(Testimony of Henry R. Cantlen.)

Q. Now, these numbers that were given were simply arbitrary or selected numbers to indicate that the transportation company was covered by insurance?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Mr. St. Clair: I object to it as being outside the cross-examination of this witness.

The Court: Sustain the objection on both grounds.

Q. (By Mr. Eisner): Were these numbers simply for the purpose of indicating to the Commissions that insurance coverage existed for the transportation company?

Mr. Murman: Same objection.

Mr. St. Clair: Same objection. [229]

The Court: I think so, Mr. Eisner, for this reason: He said that he doesn't remember he had copies of those, in the first place; and he didn't draw them, in the second place; so it would be a conclusion, in the third place.

Mr. Eisner: Well, I think it is sufficiently in evidence, anyway.

Q. Now, Mr. Cantlen, binders are issued for the purpose of temporarily covering insured for new risks, as well as for old risks, pending renewals?

A. Correct, sir.

Q. Is a risk such as that of the California Motor Transport Company a matter of negotiated premium rate based on loss experience? A. Yes, sir.

Q. It isn't a risk covered by what is referred to

(Testimony of Henry R. Cantlen.)

as the "Manual of Rates," is it? A. No, sir.

Q. Then, the statement in this binder, Defendants' Exhibit B, at the bottom of this printed form, "If the company accepts the risk, the policy issued shall supersede this binder, and the policy term shall begin on the binder date. If the risk is not accepted, this binder may run to expiration, or the company may cancel by mailing notice to the insured and to the broker or agent upon whose application it was issued. A premium charge at the rates and in compliance with the rules of the manual of [230] rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured," this reference to the manual of rates in this binder has no bearing on the policy such as was issued, No. 1457, to the California Motor Transport Company? A. Absolutely none.

The Court: Mr. Eisner, will you excuse me? I have a call from one of the judges. I would like to answer the phone.

(Thereupon, a short recess was taken.)

Q. (By Mr. Eisner): Mr. Cantlen, you have testified—you have already stated you received the policies and the retrospective agreement together the last of September, 1946?

A. That is my recollection.

Q. And you brought the retrospective agreement out to Mr. Coughlin? A. That is right, sir.

Q. And you kept the policies?

(Testimony of Henry R. Cantlen.)

A. That is right, sir.

Q. In your office, is that correct?

A. That is right.

Q. And you did not show them to Mr. Coughlin?

A. Not at that time.

Q. Did you at any time show them to Mr. Coughlin prior to October, 1947? [231]

A. No.

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. Yes, I am quite sure.

Q. When did you tell him that?

A. At the time of delivering the retrospective agreement.

Q. Do you have any definite recollection of having told Mr. Coughlin at that time that policies had been received by you from Fidelity at the same time as they delivered to you the retrospective agreement?

A. I feel certain I did.

Q. Do you have any definite recollection of it?

Mr. Murman: It has been asked and answered, Mr. Eisner.

Mr. Eisner: He says, "I feel certain of it." I think that is a conclusion.

Q. Do you have any recollection of having made any such statement?

A. Yes, I think I did, Mr. Eisner.

Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of \$2.20, as compared with the rate of 1.223, which he had been paying?

A. No, he did not.

(Testimony of Henry R. Cantlen.)

Q. Did you ever tell Mr. Mattalia or Mr. O'Malley that California Transport Company would accept policies with a 2.20 rate? [232]

A. No, I did not.

Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22nd, 1947?

A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion, the transaction wasn't completed.

Mr. Murman: I move to strike out the latter part of that answer as a conclusion of the witness, infringing upon the province of the Court. That is the real legal point here, Your Honor.

The Court: I think I will let the answer stand. He is just giving his reasons why he didn't deliver the policies.

Mr. Murman: Yes, Your Honor.

Q. (By Mr. Eisner): It is your practice, and the practice of Bayly, Martin & Fay, to deliver policies to the insured as soon as they are issued and checked, is that true?

A. Yes, within a reasonable time.

Q. You are also familiar with the fact that Section 383.5, California Insurance Code, makes it the duty of the agent or broker to deliver the original or a copy of any policy with the assured when issued?

(Testimony of Henry R. Cantlen.)

A. No, I am not familiar with that section.

Q. On October 22nd, 1947, you brought out to Mr. Coughlin [233] Plaintiff's Exhibit 17, a letter from Bayly, Martin & Fay, dated August 7, 1947?

A. No, sir; Mr. Coughlin wasn't there.

Q. To whom did you deliver it?

A. Mr. Davis.

Q. And this letter was written by you August 7, 1947, is that right?      A. That is right.

Q. And held in your possession from August 7, 1947, until October 27th, 1947?

A. That is correct.

Q. Without being mailed or sent?

A. That is correct.

Q. On October 27th, 1947, you took it with you to Mr. Davis?      A. That is right.

Q. Went over to the California Motor Transport Company and delivered to him this letter, Plaintiff's Exhibit 17, together with the policies?

A. That is right.

Q. No. 20950 and 20968, the policies?

A. That is correct.

Q. From Fidelity & Casualty Company, for the additional premium?      A. That is right.

Q. Now, then, you had received from Fidelity & Deposit Company, on April 19, or thereabouts, 1947, the statements which are [234] annexed as a part of Plaintiff's Exhibit 13?

Mr. St. Clair: I object to that on the ground it is something not in evidence. The evidence shows this was sent—a bill was sent in July, as he said.



(Testimony of Henry R. Cantlen.)

Mr. Murman: He said that was a different bill. This is not the auditor's statement which Mr. Challengburg testified was sent out on that date. This is not the cashier's bill.

Mr. St. Clair: Oh.

A. What was the question?

The Court: Read the question.

(The question was read by the reporter.)

Q. (By Mr. Eisner): And the statements show that a charge was being made under that date to California Motor Transportation Company for this additional premium, based on the 2.20 rate?

A. That is right.

Q. Then did you communicate with California Motor Transport Company, when you received these statements, and tell them you had received a bill or statement or notification from Fidelity & Casualty Company that they were demanding the premium at the rate of 2.20? A. I did not.

Q. By the way, was this the first time that you heard from Fidelity & Casualty Company that it was claiming, or intended to claim, a premium on this insurance that existed between September 1st, 1946, and January 21st, 1947, at the rate of 2.20?

A. Yes.

Q. That was the first notification you had?

A. Yes.

Q. Had you, prior to that time, received any notification from the Fidelity & Casualty Company that they were asking any premium, in addition to that which you had remitted to them, on behalf of the insured? A. That is right.

(Testimony of Henry R. Cantlen.)

Q. When you say "That is right," you had not received—I understand your answer to mean you hadn't received any such notice from the Fidelity & Casualty Company.

A. I did not receive any notification.

Q. After you received this statement of April 19th, 1947, did you take the matter up with Fidelity & Casualty Company?      A. I did.

Q. With whom did you take it up?

A. I took it up with, first, with Mr. Mettalia.

Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premiums?

A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned premium developed, or, in the gross receipts reported.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive; in other words, they were charging this earned premium on a guaranteed basis, [236] and that I would not—the assured never agreed to pay 2.20 on a guaranteed basis, and I felt that the rate was excessive on the guaranteed basis. Mr. Mettalia contended that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of 2.20.

Q. Did you thereafter take the matter up with anyone of the company, other than Mr. Mettalia?

(Testimony of Henry R. Cantlen.)

A. Yes.

Q. With whom?

A. It was a man that was—I think the title was Resident Manager or Resident Vice President, Mr. Floyd Anderson, who was in charge of the company on the Pacific Coast, and we had conferences with him on the subject.

Q. Did you tell him that same thing you had told Mr. Mettalia?           A. Yes.

Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on a retrospective basis.

Q. Now, when you went out to see Mr. Coughlin on October 22nd, 1947, and bore with you, as you have stated, the policies and the bill, did you also bring with you a draft of a letter which [237] you told Mr. Davis to copy and write to Bayly, Martin & Fay?

A. I don't know if I brought a draft. As I recall, I assisted him in dictating such a letter.

Q. You don't remember that you had already written, already had it typewritten?

A. I may have. No, it seems to me like Bill dictated the letter into the Dictograph and I assisted him in dictating it.

Q. Is it not a fact that he dictated the letter into the Dictograph from the typewritten copy of the

(Testimony of Henry R. Cantlen.)

letter which you presented to him at that time and which you had brought with you?

A. That could be possible, but I don't recall it that way.

Q. Now, I show you this letter, Plaintiff's Exhibit 18, Mr. Cantlen, and I ask you if that is the letter which Mr. Davis dictated into the machine, in your presence?

A. That is correct, sir.

The Court: Is that Exhibit 18, Mr. Eisner?

Mr. Eisner: Exhibit 18, Your Honor, yes.

Q. I call your attention to this paragraph: "During the aforementioned period, namely, from September 1, 1946, to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity & Casualty Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company."

Did you, yourself, draft that paragraph? [238]

A. I may have, yes.

Q. Is that statement true?

Mr. Murman: Well, I think the letter speaks for itself. Your Honor. It is an attempt to vary the terms of a written document.

The Court: Oh, I don't think so. I think I will allow it.

Mr. St. Clair: More properly, it is improper cross-examination, it not having been gone into on this subject.

Mr. Murman: I introduced that.

(Testimony of Henry R. Cantlen.)

Mr. Eisner: The letter was introduced on direct examination.

Mr. St. Clair: Not by this witness, though.

Mr. Murman: Yes, that is correct.

The Court: The question is whether or not that statement that was just read to you from that letter was true.       A. Yes.

Q. (By Mr. Eisner): I call your attention to this statement: "At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223."

Did you draft that statement?

A. That is true.

Q. Is that statement true?       A. Yes.

Q. "It is therefore necessary for us to decline payment of your invoices submitted in view of the aforementioned reason." [239]

Did you draft that statement?       A. Yes.

Q. Now, Mr. Cantlen, did you make any effort to collect from California Motor Transport Company the deposit premiums called for by Policy No. 20950 and 20968?

Mr. Murman: I object to that, not within the scope of the direct examination. There was no testimony on direct concerning deposit premium, and our position is, so far as this case is concerned, it is not within the issues and it is incompetent, irrelevant and immaterial.

The Court: Sustained on the ground that it was not in the direct examination of this witness.

Mr. Eisner: I don't know whether that is true, but it does seem to me counsel—of course, if you



(Testimony of Henry R. Cantlen.)

are insisting—we have a third party complaint as against Bayly, Martin & Fay, and if you want to segregate it and lengthen this case by recalling the witness upon it, it will be necessary to do so.

Mr. Murman: I stand on my objection because I don't think it is part of my case.

Mr. St. Clair: If Mr. Eisner is prepared to be bound by the answers, I have no objection, if he wants to ask him the question, whether or not it is improper cross-examination. If he wants to call this witness as his own——

The Court: That is true, it is improper cross-examination.

Mr. St. Clair: If he wants to be bound by it, I have no [240] objection to it.

The Court: He wouldn't be bound by it, not under Rule 43.

Mr. Eisner: That is true.

The Court: Which is a replica of Section 2055, CCP.

Mr. Eisner: Yes.

Q. Well, I will ask you this: I don't think it is objectionable. Did Bayly, Martin & Fay receive any bills from Fidelity & Casualty Company for the deposit premium?

Mr. Murman: Same objection.

The Court: I think, to be consistent, I will have to make the same ruling.

Mr. Eisner: All right.

Q. Now, Mr. Cantlen, Bayly, Martin & Fay received reports and remittances from California

(Testimony of Henry R. Cantlen.)

Motor Transport Company after September 1st, 1946?      A. Correct.

Q. I am going to show you——

Mr. Eisner: Do you want to see this (showing documents to counsel)?

Q. Mr. Cantlen, I show you a check dated November 7, 1946, which shows as having been cashed and made payable to Spengler & Johnstone, Inc., and ask you if you recognize that check as one of the checks from California Motor Transport Company covering the September receipts?

A. Yes, it is, Mr. Eisner. [241]

Q. This check, which shows as having been cashed, had attached to it a voucher portion, is that correct?      A. Yes.

Q. Those voucher portions you have in your possession and referred to yesterday?      A. Yes.

Q. For the purpose of convenience, I will ask you to look at the carbon copy annexed to the— attached to the check, which has been cashed, and ask you if you recognize it as the carbon copy on the entire check, including the voucher portion, that was remitted to you by California Motor Transport Company?      A. Yes.

Q. Then, for the month of September, California Motor Transport Company and its affiliates sent you four separate checks, is that true, which I now show you?      A. That would be right.

Q. And these were received by you on or about November 8th, 1946?

A. Undoubtedly, it was November 8th, because

(Testimony of Henry R. Cantlen.)

the stamp—this is our stamp—shows the 8th here. The November—but that is undoubtedly right. Well, this one came on the 13th, you see.

Q. Mr. Cantlen, these checks were combined remittances covering cargo insurance, as well as the “PF” and “PD”?

A. “PL” and “PD,” that is right, on the automobiles.

Q. The check shows on the voucher portion and the check shows [242] upon the face that the “PL” and “PD” insurance premium is calculated in each instance as 1.223, is that correct?

A. That is correct.

Mr. Eisner: We offer these checks in evidence as one exhibit. These cover the month of September.

(Documents Were Marked “Defendants’ Exhibit J,” in Evidence.)

Q. (By Mr. Eisner): Mr. Cantlen, for the month of October, 1946, I show you checks from California Motor Transport Company, dated December 10, 1946.

Mr. St. Clair: I will stipulate to the checks, Mr. Eisner, if it will simplify it, for the purpose of the record.

A. Yes.

Mr. Murman: I have no question but what the defendants sent those checks to Bayly, Martin & Fay, and I think they should be marked separately as exhibits.

Mr. St. Clair: If Mr. Eisner will tell us those are their checks, that will be satisfactory with me.

(Testimony of Henry R. Cantlen.)

Mr. Eisner: These are the checks and carbon copies of vouchers for the entire checks.

The Court: Those show the rate as 1.223?

Mr. Eisner: Yes, throughout.

Mr. Murman: Those, of course, only went between the defendants' and Mr. Cantlen's office. They did not come to the plaintiff. You are not contending that?

Mr. Eisner: They went to the office of Bayly, Martin & Fay, [243] but whether they went to the Fidelity & Casualty Company through the agency of Bayly, Martin & Fay is another question. In other words, whether or not Bayly, Martin & Fay was the agent of Fidelity & Casualty Company for the purpose of receiving cash and collecting the premium is another question, but physically——

Mr. Murman: That is the reason I want to clear up the point. I am only stipulating that those are the checks that the defendants in this case sent to Bayly, Martin & Fay covering the voluntary audits or monthly reports for the months they show.

The Court: That is the only purpose of this evidence, so far?

Mr. Murman: Yes, Your Honor.

(Documents Were Marked "Defendants' Exhibit K," in Evidence.)

Mr. Eisner: We offer in evidence, as Defendants' exhibit next in order, check dated January 16, 1947, covering the month of November, 1946, and each one of these checks and voucher check likewise show upon its face that the rate is 1.223.

(Testimony of Henry R. Cantlen.)

(A Document Was Marked "Defendants' Exhibit L," in Evidence.)

Mr. Eisner: And we offer in evidence, as Defendants' exhibit next in order, checks dated February 20, 1947, covering the month of December, 1946, and each one of these checks, likewise, showing upon the face the rate of 1.223.

(Document Was Marked "Defendants' Exhibit M," in Evidence.) [244]

Mr. Eisner: We offer in evidence, as Defendants' exhibit next in order, checks dated March 25, 1947, covering the period from January 1st, 1947, to January 21st—to January 19, 1947, inclusive, and showing upon their face the same rate.

(Documents Were Marked "Defendants' Exhibit N," in Evidence.)

Q. (By Mr. Eisner): Now, Mr. Cantlen, when you received these voucher checks or remittances, did you—you accepted them from California Motor Transport Company without any protest or objection, that is true, is it not? A. Yes.

Q. Is it a fact that Fidelity & Deposit Company looked to Bayly, Martin & Fay to collect the premium from the insured and remit to Fidelity & Casualty Company?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Mr. Eisner: If he knows whether or not the Fidelity & Casualty Company looked to Bayly, Martin & Fay.



(Testimony of Henry R. Cantlen.)

Mr. Murman: I don't see how he can testify to that. He can testify what arrangement might have been between them.

Mr. Eisner: Withdraw it, then.

Q. Was it the arrangement between Bayly, Martin & Fay and Fidelity & Casualty Company that Bayly, Martin & Fay should collect the premium from the California Motor Transport Company and remit it to the Fidelity & Casualty Company? A. That is correct. [245]

Q. That arrangement pertained not only to the premium of California Motor Transport Company but to all other premiums and insurance that were placed through the office of Bayly, Martin & Fay and written by the Fidelity & Casualty Company?

A. That is true.

The Court: Let me clear this up. In other words, you, as broker, not only placed this insurance but placed other insurance for them for the other companies?

A. That is correct.

The Court: You collected the money from them that was due each of these companies and remitted it?

A. Yes. In these vouchers, there was another company involved other than the Fidelity & Casualty Insurance Company.

Mr. St. Clair: You mean other than the California Motor Transport Company?

A. No, another than Fidelity & Casualty.

Mr. St. Clair: In other words, on these vouchers, you collected money from California Motor Trans-

(Testimony of Henry R. Cantlen.)

port Company that was due not only on account of the premium of Fidelity & Casualty Company, but another company as well?

A. That is correct.

Mr. Eisner: The company that had written the cargo insurance?

A. That is correct.

The Court: Did you place any other insurance other than [246] these for the defendants?

A. Yes.

The Court: Placed other lines, too?

A. Yes.

The Court: Then collected the money from them and remitted it to the particular insurance company involved?

A. With all of our business.

Q. (By Mr. Eisner): Then, as I understand it, it was your practice to wait sixty to ninety days before turning the money over to the insurance company?

A. Not necessarily, Mr. Eisner. Our practice is that as of a certain day of the month we remit, ordinarily, to the insurance companies funds of those insurance companies collected during that particular month.

Q. Now, you collected from the California Motor Transport Company the September premium, my recollection is, in the month of November, November 7th, 1946?

A. Yes.

Q. When did you remit to the Fidelity & Cas-

(Testimony of Henry R. Cantlen.)

ualty Company the premium that you had so collected?      A. For the month of September?

Q. Yes.

A. We remitted September and October—we forwarded the reports for September and October, our computation here, according to this record, on January 27. [247]

Q. 1947?

A. 1947. Any time we remitted the money can be determined from its remittance sheets.

Mr. St. Clair: The checks are marked for identification, Mr. Eisner, but are not actually in evidence yet, the checks from Bayly, Martin & Fay to the insurance company. I believe, however, it is about that same date. The checks are dated January 28th, I believe.

The Court: I think they run from D to G.

Mr. Murman: That is correct.

Q. (By Mr. Eisner): Counsel drew my attention to checks which run from "D" to "G," Defendants' Exhibits. It is a fact, then, Mr. Cantlen, the money you collected on November 7, 1946, was remitted on January 28, 1947?

A. No. Yes, the remittance is made, according to that, November, 1946, and was remitted to the company on January 28, 1947.

Q. Yes. When you received these voucher checks, Mr. Cantlen, as you have stated, they covered a combined premium, that is, premium not only on the public liability but also on cargo insurance?

A. That is right.

(Testimony of Henry R. Cantlen.)

Q. So it was necessary for you to process—I believe you used the word—— A. Yes. [248]

Q. ——these reports, is that true?

A. That is true.

Q. Then you took these voucher checks with the information contained thereon, and from those voucher checks you made up Plaintiff's Exhibit 10?

A. When I say I did, I mean my office did. I did not do it personally.

Q. Well, was it done under your supervision?

A. It would be done under my supervision, yes.

Q. When, according to your best recollection, was Plaintiff's Exhibit 10 prepared in your office?

Mr. Murman: That exhibit has five different documents attached to it covering different dates.

A. Let's see; that is—now, September and October, 1946, were prepared, would have been prepared, just prior to January 27th, in our office——

Q. (By Mr. Eisner): Yes.

A. ——and forwarded on to the insurance company. Does that answer the question?

Q. Then——

A. Now, November, according to this file, was prepared just prior to January 30, 1947.

Q. Yes.

A. December was prepared just prior to February 24th.

Q. 1947? [249] A. Yes.

Q. Now, then, Mr. Cantlen, upon these voucher checks that you had received from California

(Testimony of Henry R. Cantlen.)

Motor Transport Company, the rate for public liability was shown as 1.223, is that correct?

A. That is correct.

Q. And in your processing of those reports received from California Motor Transport Company, I understand you broke down that 1.223 into two parts, .997 and .226, the .997 covering primary public liability and the .226 property damage, is that correct?

A. Well, the only misstatement you make is that the .997 is for the combined. There was no primary or excess in existence under this rating.

Q. In other words, the .997 was the entire public liability rate?

A. The liability portion, yes.

Q. And the .226 was the entire property damage?

A. Automobile property damage.

Q. And did these rates that are shown upon this report which was prepared are the same rates that are contained in Policy 1457 that was in existence from September 1st, 1945, to September 1st, 1946?

A. That is correct.

Q. Now, then, Mr. Cantlen, you sent these reports under the dates you have mentioned to the Fidelity & Casualty Company? [250]

A. Yes, sir.

Q. Did you receive any protest or objection of any kind from the Fidelity & Casualty Company?

A. No, we did not.

Q. Your checks to the Fidelity & Casualty Company were cashed?

A. Yes, they were.



(Testimony of Henry R. Cantlen.)

Q. And you did not hear anything by way of objection or claim of additional premium until you received copies of the statements dated April 14, 1947?

A. Well, you call that the final audit.

Q. Are those what you refer to as the final audit?

A. That is correct.

Q. By the way, these final audits are simply checks made of the records of the insured to determine whether or not the insured has properly reported his gross receipts?

Mr. Murman: No, that is not the truth.

The Court: The witness already testified it is so as to determine whether they were figured on the proper premium rate, and also whether or not it includes—been properly classified as to risk, is that about right?

A. Yes, the exposures and the receipts.

Q. (By Mr. Eisner): Then, the first information you have received from Fidelity & Casualty Company was after this final audit of April 14, 1947?

A. That is correct. [251]

Q. When was it that Mr. Mettalia told you that the home office insisted upon the policies being declared and the retrospective agreement executed?

A. As I testified, it was just prior to September 24th.

Q. And thereafter you continued to try to work out an agreement with Fidelity & Casualty Company, and also to place the insurance elsewhere?

A. Correct.

Q. And Mr. Coughlin was just as adamant in

(Testimony of Henry R. Cantlen.)

refusing the retrospective agreement as the company was in insisting upon it?      A. That is right.

Q. Finally, on December 19, 1946, you received copies of notices of the cancellation to be effective on January 21st, 1947?      A. That is right.

Q. Did you then tell Mr. Coughlin the binder would terminate on January 21st, 1947, and that he had until that date to place the insurance elsewhere?

Mr. Murman: Objected to as incompetent, irrelevant, and immaterial, an attempt to vary the terms of a written instrument. The binder speaks for itself.

The Court: He is asking about a conversation, not what was in the written instrument. Overruled.

The Witness: May I hear the question again?

(The question was read by the reporter.)

Q. (By Mr. Eisner): Did you then tell Mr. Coughlin as of the receipt of the notice of that cancellation that the binder would terminate on January 21st, 1947, and that the Company had until that date to place the insurance elsewhere?

A. No.

Q. Did you at any time tell Mr. Coughlin his coverage under the binder would end prior to the time that the notice of cancellation was received in December?      A. No.

Q. You never said anything to Mr. Coughlin

(Testimony of Henry R. Cantlen.)

about the binder being cancelled——

A. No.

Q. ——or terminated?

I think that is all, if the Court please.

The Court: We will take a recess of about five minutes.

(Thereupon, a short recess was taken.)

Mr. St. Clair: If Your Honor please, it appears to me, although I would be giving up a slight advantage, it would be better for me to take this witness as my own witness and put in the direct, as well as any rebuttal, and counsel are agreeable to that.

The Court: That will shorten it.

Mr. St. Clair: Yes. However, Mr. Murman wishes to ask some questions, and then he can technically rest his case.

Mr. Murman: I haven't rested yet, and I thought I could [253] put in the redirect examination, then rest, and that would bring my part of the case to a conclusion.

### Redirect Examination

By Mr. Murman:

Q. Mr. Cantlen, as to this matter of rate, which is reflected by the policies in question, Plaintiff's Exhibits 3 and 4, the renewal policies, as I understood your previous testimony, you did have some discussion with Mr. Coughlin concerning increase in rates prior to the renewal, did you not?

A. Yes.

(Testimony of Henry R. Cantlen.)

Q. Isn't it true, at that time, that the National Bureau, the same bureau to which this matter of the rate was submitted, as evidenced by Plaintiff's Exhibit 1—you have seen that, have you not?—had known of the general increase in rate throughout the whole country on this type of contract?

A. Well, there was a general increase in all automobile insurance lines as of January 1st, 1946.

Q. That came during the time that the contract No. 1457 was already in force?

A. That is right.

Q. So that the call for increase in rates would refer to the renewal, would it not, not the existing contract?

A. Well, that would still be dependent on experience. The fact that this bureau increased the automobile insurance rates would not have a particular effect on this risk. The renewal [254] rate would be dependent on the experience that the company would have witnessed under the existing contract and previous contract.

Q. In that connection, you had already inquired concerning the experience and had received, had you not, from Mr. Mettalia a statement of the loss ratio on the various contracts in August, 1941?

A. In July.

Q. So that you, at that time, knew something concerning the increase in rates that they were contemplating?

A. I felt there would be an increase.

Q. You stated that to Mr. Coughlin, did you not?

(Testimony of Henry R. Cantlen.)

A. Yes.

Q. So that, although the exact amount of 2.20 was never mentioned, there was conversation about a rate increase? A. Correct.

Q. Did you want to look at this? I interrupted you. This is Plaintiff's Exhibit 1, regarding the rate.

A. I don't see that this has any bearing.

Q. When you got the policies, Plaintiff's Exhibits 3 and 4, 20968 and 20950, did you look through them at all, read them over, examine them?

A. Oh, yes.

Q. Did you look at the portion of them that sets up the rate for the particular policy? [255]

A. Yes.

Q. Did you notice that for Policy No. 20968, which is Plaintiff's Exhibit 3, there was set forth therein on Endorsement No. 7 that the rate per hundred dollars of gross earnings was \$2.00, final rate to be determined by audit? A. Yes.

Q. This policy was in your possession, I think you said, the latter part of December, 1946?

A. That is right.

Q. Did you also notice a similar endorsement in No. 20968 where the rate was to be twenty cents for the excess— A. Yes.

Q. —subject to final audit? So that at the time you got these policies from the plaintiff in this case you were aware that the policies themselves set up those rates, is that correct?



(Testimony of Henry R. Cantlen.)

A. Yes, they set up those rates, but they are issued in conjunction with another agreement.

Q. I would like to have you take Policy No. 20968, which is the primary policy, Plaintiff's Exhibit 3, and point out to the Court where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into. [256]

Q. There is, however, nothing in the policy itself that refers to retrospective agreement?

Mr. St. Clair: The policy speaks for itself.

Mr. Murman: That is correct, but I am asking him to point it out, if there is anything.

A. I don't see that it makes any difference.

The Court: There isn't in 20968, but there is in the other.

Mr. Murman: There is a reference to that, but not to the rate, that is, in the primary, Your Honor.

The Court: Well, the documents will show.

Mr. Murman: Yes, Your Honor.

Q. Now, I believe you testified, Mr. Cantlen, that during this period of time you referred to the company for handling a claim, which was identified as Plaintiff's Exhibit 16, referring specifically to the portion setting forth the rates that we have been talking about, and you did that irrespective of the fact that the retrospective agreement had not yet been signed, isn't that correct?

(Testimony of Henry R. Cantlen.)

A. That is right.

Q. In other words, you expected the company to handle this claim, even though it was claimed the defendants in this case hadn't signed the retrospective agreement, is that right?

A. That is right.

Q. And that is one of the exhibits you said you had not yourself forwarded but that went directly from the defendants to [257] the plaintiff, or was sent in to the plaintiff for handling, even though there had been no signing on the retrospective agreement, is that correct? A. That is right.

Q. Now, on these voluntary audits that you developed through processing the defendants' reports to you concerning gross earnings and premiums which they calculated had been earned on those gross earnings, those voluntary audits were again sent in with specific reference to the policies 20950 and 20968, isn't that correct?

A. That is right.

Q. At that time you had the policies in your possession? A. That is right.

Q. You had examined and seen an endorsement in them regarding rates, isn't that correct?

A. That is right.

Q. And you also knew, did you not, Mr. Cantlen, that these reports were subject to final audit, as you have stated? A. Yes.

Q. The cancellation which took place, as evidenced by Plaintiff's Exhibits 5 and 6, that took place before any remittances by you to the com-

(Testimony of Henry R. Cantlen.)

pany on the basis of these reports or voluntary audits, isn't that correct?

A. That is correct.

Q. And it was after the cancellation notices that you did make [258] those remittances?

A. That is correct.

Q. And I believe some of them were made even after the date of the cancellation, isn't that correct?

A. Yes.

Q. And those remittances were also made following notice to the defendants that their filings with the Railroad Commission had also been cancelled the same time as the cancellation of the policies, isn't that correct?

A. Well, I never saw that.

Q. You mean Plaintiff's Exhibit 2—maybe I have gotten the filing date here. Anyway, you didn't see the notice of cancellation that was sent out—

A. No.

Q. —to the company?

A. To the Commission.

Q. No, to the company, a copy to the Commission. You didn't see that?

A. No.

Q. I mean to the defendants; pardon me.

A. No.

Q. On the previous contracts that I referred you to here in the letter which you got from Mr. Mettalia, your Exhibit BB, in these previous contracts running from 1947 to 1946, 1945, were there final audits in the case of each of those contracts? [259]

A. Yes, there was.

(Testimony of Henry R. Cantlen.)

Q. And there was a premium payable to the company on the basis of those final audits, after the voluntary audits had taken place?

A. I would have to check that. There might be either an additional premium or return premium.

Q. Anyway, there was a final adjustment of premium in each case? A. Correct.

Q. And with respect to the final audit in this case as to the particular policies with which we are concerned, Plaintiff's Exhibits 3 and 4, in April of 1947, that was in the usual handling of the insurance problem, wasn't it? I mean, there is nothing unusual about receiving those final audits.

A. To receive the audit, no.

Q. You expected there would be a final audit?

A. Yes.

Q. Covering the period the policy was in effect prior to cancellation? A. Yes.

Q. One other question, Mr. Cantlen——

Mr. Murman: I think you covered it, though. No further questions.

Mr. Eisner: I have one more question.

Mr. Murman: I would like to rest my case, Mr. Eisner. If [260] you want to ask it during my case, all right.

Mr. Eisner: All right.

### Cross-Examination

By Mr. Eisner:

Q. You have spoken about the numbers, and I

(Testimony of Henry R. Cantlen.)

want to ask you if it is a fact whenever, after August 27th, 1946, the insurance coverage by Fidelity of California Motor Transport Company was referred to, it was referred to by policy numbers 20950 and 20968?

A. I don't understand your question.

Q. Well, the binder was issued on August 27, 1946, wasn't it?      A. Yes.

Q. The notification was given to the Interstate Commerce Commission and the Railroad Commission prior to August 27th, 1946, pertaining to coverage of the California Motor Transport Company?

A. Correct.

Q. In those notices, the Railroad Commission and Interstate Commerce Commission, prior to August 27th, 1946, the notification stated that the coverage was reflected by Policies 20950 and 20968.

Mr. Murman: I think just 20968.

Q. (By Mr. Eisner): All right; 20968, is that it?

A. Yes.

Q. At that time, no policy 20968 was in existence?

A. Well, it was in existence but not written.

Q. No rate or terms had been agreed upon for that policy?      A. No.

Q. After August 27th, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage re-



(Testimony of Henry R. Cantlen.)

ferred to or identified in the same manner as Policy 20968?      A. My recollection, it was.

Q. It was so referred to?      A. Yes.

Mr. Eisner: That is all.

Mr. Murman: At this time, if the Court please, the plaintiff rests its case.

(Plaintiff rests.)

Mr. St. Clair: Pursuant to our understanding, Your Honor, I will call this witness as my witness for and on behalf of Bayly, Martin & Fay, and will attempt to also do a little redirect examination—I guess cross-examination, I mean.

Direct Examination

By Mr. St. Clair:

Q. Mr. Cantlen, I hand you a file and ask you if that is a file taken from the files of Bayly, Martin & Fay?      A. Yes, it is.

Q. It should—I hope it does—cover the policy year of [262] September 1, 1941, to September 1, 1942, is that correct?      A. Yes, it does.

Q. Prior to September 1, 1941, did you have any conversation or conversations with Mr. Coughlin, who is the president of one of the defendants herein, in regard to insurance?      A. Yes.

Q. At that time, was Mr. Coughlin's company insurance, being handled, that is, its public liability insurance, being handled by Bayly, Martin & Fay as his broker?      A. No, it wasn't.

Q. When you had this conversation with Mr. Coughlin, what month was it, do you recall?

(Testimony of Henry R. Cantlen.)

A. Oh, my best recollection would be around July of 1941.

Q. Where did you have the conversation?

A. At his office.

Q. Who was there?

A. Mr. Coughlin, and I recall Mr. Spengler was with me.

Q. Who was then an associate of Bayly, Martin & Fay?      A. Yes.

Q. He was a broker?      A. Yes.

Q. What was the conversation with Coughlin at that time?

A. We were talking to Mr. Coughlin about the possibility of our writing his comprehensive liability and property damage coverage, it having been previously handled by Spengler & [263] Johnstone. Spengler & Johnstone had affiliated with us, and we had a general discussion about his existing coverage and how he was getting along with his present carrier, and he indicated to me at that time that if we could work out an arrangement which he considered satisfactory he might entertain the idea of we again handling this account.

Q. And did he indicate the rate at which he would be interested?

A. I don't think so at that time. There was a later meeting near the expiration date of September 1st, we had another conference, and he indicated to me that it looked like his present carrier was going to insist upon an increase in premium, and that if we were able to offer him a rate, as I recall it,

(Testimony of Henry R. Cantlen.)

according to my recollection, in the neighborhood of \$1.25, he might be interested in entertaining proposition from us.

Q. Following that conversation or those conversations—withdraw that. Was anything said by Mr. Coughlin with regard to your talking to any insurance company?

A. I don't understand you.

Q. Well, on his behalf, was there anything said of your talking to an insurance company and seeing if you could place his risk?

A. He said he would be possibly interested, and I told him that I would see if we couldn't negotiate a rate with an insurance company that may be attractive to him. [264]

Q. Did you go and talk to an insurance company?

A. Yes. At that time I went to the logical carrier, Fidelity & Casualty Company; the reason for it, they had previously carried Mr. Coughlin and California.

Mr. Eisner: We object to any reasons; entirely incompetent, irrelevant and immaterial. If there are conversations with Mr. Coughlin—

The Court: Well, he can ask what he did. He said he went to Fidelity, and gave his reasons why he went, which, I think, is immaterial.

Mr. St. Clair: I think it is, too, Your Honor.

A. I went to Fidelity & Casualty Company and discussed the possibility of their entertaining the risk.

(Testimony of Henry R. Cantlen.)

Q. (By Mr. St. Clair): They had been on the risk before? A. Yes.

Q. Do you have a memo in that file made at the time of that meeting with Fidelity & Casualty Company? A. Yes, I have.

Q. Is that in your own handwriting?

A. Yes.

Q. Was it made at the time? A. Yes.

Q. And what was the offer, if I may call it that, of Fidelity & Casualty Company, at that time, in regard to carrying Coughlin's risk? [265]

A. As I remember, they offered to write the primary at rates of one per cent—one per cent per \$100.00 of gross receipts. I talked with J. L. Culpepper, who is an agency supervisor for Fidelity & Casualty Company, and he agreed to assume the primary of five and ten thousand, property damage of five thousand, at a rate of one per cent, with the understanding that we would start out at that rating, and from there on the risk would more or less make its own rate, dependent upon the experience.

Q. Where was the excess to be written?

A. We arranged to place the excess with underwriters at Lloyd's. Doing that, we were able to do it cheaper than we can—than we can get Fidelity & Casualty Company on a kind of gross over-all rate for the cover of 1.21.

Q. Did you report that to the officials, to Mr. Coughlin?

A. Yes. It was, according to my file, previous to August 20th, I had a telephone conversation with

(Testimony of Henry R. Cantlen.)

Mr. Coughlin and gave him the proposal, and he gave us the firm order to place the business as of September 1st, 1941.

Q. In that conversation with Coughlin when he gave you the firm order, did you discuss with him the matter of annual adjustment of the rate dependent on the risk experience?

Mr. Eisner: I object to any leading questions, if the Court please. I object to this as leading and suggestive.

The Court: All right, I will sustain it. [266]

Q. (By Mr. St. Clair): Mr. Cantlen, will you tell us what the conversation was, the telephone conversation with Coughlin at the time he gave you the firm order? A. I explained to him——

Q. You have already stated you told him what the proposal was. What did you say to Coughlin?

A. I told him that the Fidelity & Casualty Company was willing to resume the risk at a rate of one per cent for the primary, and that they would go along with the risk and adjust the rate annually, dependent on the loss experience, and we could place the excess at the underwriters at Lloyd's, which would give him a combined rate guaranteed cost of, for that year, of 1.21.

Q. Were policies issued by the F. & C. at that rate and under that understanding?

A. Yes, they were.

Q. Effective September 1st, 1941, is that correct?

A. That is right.

Q. Were there other arrangements to be made



(Testimony of Henry R. Cantlen.)

that were carried out with your office with regard to the starting of this insurance; that is, was there any written authority from California Motor Transport Company to the Fidelity & Casualty Company with regard to this policy and the rate?

A. No.

Q. The policy was issued? Did you have it physically in your possession? [267]

A. Yes.

Q. What did you do with it?

A. I delivered the original to the California Motor Transport Company.

Q. Do you have a daily report of that policy?

A. Yes.

Q. With regard to the question that was asked you about any binders having been issued, is there any indication on the face of that policy with reference to a binder?

A. Yes, the policy shows that there was issued a legal binder No. W-74710.

Q. That binder doesn't show in your files at the moment?

A. No.

Q. Were you handling—I believe you testified you were handling other insurance for Mr. Coughlin in 1946. Were you handling other insurance for him in 1941?

A. Yes.

Q. What was that?

A. I think we had the cargo cover. Yes, the cargo insurance. And we had some miscellaneous covers, some bonds, some safe burglary, and what we call miscellaneous coverages.

(Testimony of Henry R. Cantlen.)

Q. Had you been covering those before September 1st, 1946? A. Yes.

Q. Before this policy was written?

A. This was written in September, 1941. [268]

Q. 1941? I beg your pardon. But you had been Coughlin's broker, then, all the time?

A. No, we had not. Bayly, Martin & Fay—I went to Bayly, Martin & Fay in October, 1940, and Spengler & Johnstone affiliated itself with us as of October 1st, 1940. Spengler & Johnstone had been carrying coverages, or handling insurance, for the account of California Motor Transport Company as far back as I know, as far as 1930.

Q. You had been with Spengler & Johnstone yourself in previous years?

A. I was with them from 1930 to 1935.

Q. On that policy from 1941 to 1942, does Bayly, Martin & Fay show as broker?

A. Yes, they do.

Q. Now I hand you what purports to be a file for the next insured year, and ask you if, prior to September 1st, 1942, you were acting as broker for Mr. Coughlin's companies?

A. Prior to September 1st, 1942?

Q. Yes. A. Yes.

Q. Did you negotiate an insurance contract starting September 1st, 1942? A. Yes.

Q. Was a policy issued for the year 1942 to 1943 by the Fidelity & Casualty Company? [269]

A. Yes.

Q. Was there any change in rate?

(Testimony of Henry R. Cantlen.)

A. No, there wasn't.

Q. Had there been any negotiations prior to its issuance between you and the insurance company?

A. Yes, prior to September 1st, 1942, I again went over the experience—I went over the experience for the first nine months of the year 1941 to 1942, and it was satisfactory to the company on the rate, the extended rate, and they agreed to renew their contract along at the same rate.

Q. And did you, prior to September 1st, 1942, report that to Mr. Coughlin?           A. I did.

Q. What did he say?

A. He agreed to continue with the company at the same rate.

Q. Was the policy issued and given to you?

A. Yes, it was.

Q. What did you do with it?

A. Delivered it to the California Motor Transport Company.

Q. I hand you a file that purports to be the Bayly, Martin & Fay file for the year 1943-1944, and ask you if that is a file taken from the files of that company?

A. Yes, it is.

Q. Prior to September 1st, 1943, did you have any conversation with the Fidelity & Casualty Company people with regard to [270] renewal?

A. Yes, I did.

Q. With whom did you have such conversation?

A. With J. L. Culpepper.

Q. What took place at that conversation?

A. We reviewed the experience figures that he

(Testimony of Henry R. Cantlen.)

had, and my recollection as of this year, there were some claims that were boosting the experience, but they were in the form of reserves, and they agreed that the payments were questionable, and I believe they agreed to go along at the same rate.

Q. What do you mean, the payments were questionable?

A. The actual loss payments may be questioned and the company sets up reserves for losses, and I reviewed the figures, the loss figures, and contended that the reserves were excessive; so, in view of the experience of the preceding years, they agreed to go along at the same rate.

Q. Was a policy issued—withdraw that. Did you report that conversation to Mr. Coughlin?

A. Yes.

Q. Where and how?

A. I would always go to this office and discuss the situation with him.

Q. Did you report your conversation with Culpepper in full? A. Yes, I would.

Q. Was a policy issued to Mr. Coughlin's companies, effective [271] September 1st, 1943?

Q. What date was it issued?

A. According to this, on September 3rd, 1943.

Q. Is there any record in the file as to whether there was a binder issued to cover it?

Mr. Eisner: That was from September 1st, 1942, to September 3rd, 1943?

A. No, I don't find that we have a record of a binder.

(Testimony of Henry R. Cantlen.)

Q. Do you have any independent recollection as to whether there was or was not a binder?

A. No, I do not.

Q. During the month of September, 1943, and before the issuance of the policy, were there any negotiations between you and F. & C. with regard to the rate?

A. What was the question again?

Q. During the month of September, 1943, and after the policy was issued, was there any negotiation between you and F. & C. with regard to the rate?

A. After September, 1943?

Q. During September, 1943, and after the issuance of the policy. Well, in the interest of saving time, if Mr. Eisner won't object, was there any change negotiated in the way of handling the excess premium?

A. At one point, yes. The Fidelity & Casualty Company came to us and said that they would like the rate of excess combined [272] with the primary for the same cost that we were paying the underwriters at Lloyd's, in the interest of having a greater premium income to them, which I thought was a sound idea, and so reported to Mr. Coughlin and recommended we combine the cover with Fidelity & Casualty Company, in the interest of giving them a greater premium as against the loss ratio. I can check this, but it was amended as of October 1st, 1943, where the full limit of one hundred and three hundred thousand went and were placed with the Fidelity & Casualty Company.



(Testimony of Henry R. Cantlen.)

Q. I hand you what purports to be a file from your office for the combined years 1944-43 and 1945-46, and ask you if that is a file taken from the files of Bayly, Martin & Fay?

A. Yes, it is.

Q. Prior to September 1st, 1944, were there any negotiations or discussions between either you and F. & C. or between you and the California Motor Transport Company regarding rate or claim analysis?

A. Prior to September, 1944?

Q. I suggest, for your recollection, a letter of August 10th.

A. 1944?

Q. To California Motor Transport.

A. Wait a minute. August 10th, 1944?

Q. Yes.

A. That would be in the previous file, wouldn't it?

Q. Oh, I beg your pardon. [273]

A. I don't seem to find any letter of August 10, 1944.

Q. All right. Do you have any independent recollection of any conversations prior to September 1st, 1944?

A. Yes; Culpepper came to my office with an experience sheet showing the figures, loss figures, on the previous policy and the existing policy.

Q. I believe if you will look at that previous file, Mr. Cantlen, that you had previously, you will find those letters. Anyway, go ahead with the conversation with Culpepper.

A. Well, the risk was running unfavorably.

(Testimony of Henry R. Cantlen.)

Again we reviewed the cases for this renewal period, and my recollection, I think there was some correspondence in connection with it where he agreed to go along and renew at the same rate, pending adjustment of rate on the basis of the ultimate loss settlement figures of these outstanding cases.

Q. Were there any cases you remember in particular?

A. There was a case in Los Angeles, the Brazil case—I think the name of the claimant was Brazil—and they had a considerable amount of money set up in reserve for that case. It was a question of liability. And I took the position that there was no liability on the part of the assured and the reserves were excessive, and ultimately the ultimate payment would be lower than was retained in the reserves.

Q. Did you have any conversation with Mr. Coughlin as a result of this? [274]

A. I did. We keep him advised of his loss experience at all times and of our negotiations with the insurance company.

Q. Was a policy issued for the year 1943-44?

A. Yes.

Q. What was that policy number? Here is the file.

A. SPL-882.

Q. And 1944-45, was there a policy issued as the result of these negotiations?

A. Yes, there was.

Q. What is the date of that policy?

A. The effective date?

(Testimony of Henry R. Cantlen.)

Q. Yes. A. September 1st, 1944.

Q. When was it issued?

A. On August 18, 1944.

Q. Can I refer you to your file, a letter dated August 24, 1944? A. This is 1946—1945.

Q. August 24? A. Yes.

Q. Do you find in your file a carbon of the letter? A. Yes.

Q. May I have it, please? You identify this as a carbon copy of a letter that was in your file?

A. Yes. [275]

Q. Letter addressed to—it is identified by the witness.

Mr. St. Clair: We offer it, Your Honor.

Mr. Eisner: To whom was it written?

Mr. St. Clair: Dated August 24, 1944, addressed to the California Motor Transport. We offer the letter, as identified by the witness——

Mr. Murman: May I see it?

Mr. St. Clair: Oh, I beg your pardon.

(Handing document to Mr. Murman.)

The Clerk: That will be Third Party Defendants' Exhibit DD.

(A Document Was Marked "Third Party Defendants' Exhibit DD.")

Mr. St. Clair: "August 24, 1944. California Motors, Ltd., to J. C. Coughlin."

(Reading Third Party Defendants, Exhibit DD.)

(Testimony of Henry R. Cantlen.)

Q. (By Mr. St. Clair): Now, subsequent to that, did you have any negotiations or correspondence with the F. & C. concerning a follow-up on the claims, Mr. Cantlen, that were mentioned in the letter of August 24th?

A. Yes. On August 10, 1944, I wrote a letter to the California Motor Transport Company.

Q. This is the August 10th letter that we referred to before that you were not able to find in the file? A. Yes.

Q. Subsequent to August 24th, were there any letters exchanged between you and the Fidelity & Casualty Company in regard to [276] these claims, or did you have any conversation, if there were no letters?

A. Well, I wrote a letter on October 12th, 1944, to the Fidelity & Casualty Company, as indicated here.

Q. And you identify this as a carbon of a letter addressed by you to Fidelity & Casualty Company?

A. Yes.

Q. I show you what purports to be a carbon of a letter of December 8, and ask you if that is taken from your files and is a carbon of a letter you wrote to the Fidelity & Casualty Company?

A. Yes.

Mr. St. Clair: The offer is identified by the witness, the letter of October 12th, is offered as Third Party Defendants' exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit EE." in evidence.)

(Testimony of Henry R. Cantlen.)

Mr. St. Clair: We offer the letter of December 8th, as identified by the witness, as our exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit FF," in Evidence.)

Mr. St. Clair: The letter of October 12th, 1944, to Fidelity & Casualty Company, attention Mr. Culpepper——

(Reading Third Party Defendants' Exhibit EE.)

Letter of December 8th, as identified by the witness, [277] addressed to Fidelity & Casualty Company, regarding the same company and policy, under date of October 17——

(Reading Third Party Defendants' Exhibit FF).

Q. (By Mr. St. Clair): Now, with regard to 1945-46 policy, Mr. Cantlen, will you refer to your file, a letter of July 24th, to California Motor Transport Company?      A. July 24th?

Q. 1945.

A. 1945? July 24, 1945, to the California Motor Transport?

Q. Do you find such a letter?      A. Yes.

Q. Do you find a carbon in your file, and you identify that as a carbon of a letter you wrote to California Motor Transport Company?

A. Yes.



(Testimony of Henry R. Cantlen.)

Q. There is a pencilled notation on the bottom of that letter. Is that in your handwriting?

A. No, it is not.

Mr. St. Clair: May I ask that the letter identified by the witness be admitted in evidence as our exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit GG," in Evidence.)

Mr. St. Clair: That letter reads as follows:

(Reading Third Party Defendants' Exhibit GG.)

Q. (By Mr. St. Clair): About that same time, Mr. Cantlen—— [278]

The Court: Mr. St. Clair, it is twelve o'clock. I think we better take an adjournment until two o'clock now.

(Thereupon, this cause was adjourned to the hour of 2:00 o'clock p.m.) [279]

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Afternoon Session, Tuesday, October 11, 1949

HENRY R. CANTLEN

resumed.

Direct Examination  
(Continued)

By Mr. St. Clair:

Q. Mr. Cantlen, I show you Exhibit DD, which

(Testimony of Henry R. Cantlen.)

is a letter of August 24, and ask you if preceding that letter there were two letters in the file which are the two you were unable to find this morning?

A. Yes.

Q. You have now located those two letters?

A. Yes.

Mr. St. Clair: I have a series of letters, Your Honor. I have hoped we can stipulate them in. Is it satisfactory to counsel to put these letters in by stipulation?

Mr. Eisner: It is with me.

Mr. Murman: I have no objection.

Mr. St. Clair: We offer them without further identification. I myself took them from the Bayly, Martin & Fay files. Letter dated August 10, 1944.

(A Document Was Marked "Third Party Defendants' Exhibit HH," in Evidence.)

Mr. St. Clair: I offer in evidence a letter dated August 25, 1944.

(A Document Was Marked "Third Party Defendants' Exhibit II," in Evidence.) [280]

Mr. St. Clair: I offer, progressively, separate exhibits next in order, letter of August 2nd, 1945.

(Document Was Marked "Third Party Defendants' Exhibit JJ," in Evidence.)

Mr. St. Clair: August 8, 1945.

(Document Was Marked "Third Party Defendants' Exhibit KK," in Evidence.)

(Testimony of Henry R. Cantlen.)

Mr. St. Clair: August 23rd, 1945.

(Document Was Marked "Third Party Defendants' Exhibit LL," in Evidence.)

Mr. St. Clair: August 24, 1945.

(Document Was Marked "Third Party Defendants' Exhibit MM," in Evidence.)

Mr. St. Clair: Letter of August 10, Exhibit HH, dated October—dated August 10, 1945, addressed to California Motor Transport Company, Mr. J. C. Coughlin.

The Court: That is 1944?

Mr. St. Clair: 1944, Your Honor; thank you. (Reading Third Party Defendants' Exhibit HH.)

The letter of August 23rd, 1944, Exhibit II, is also addressed to the California Motor Transport Company, from Bayly, Martin & Fay, and reads: (Reading Third Party Defendants' Exhibit II.)

Q. (By Mr. St. Clair): Subsequent to that letter of August 24th, Mr. Cantlen, 1944, there was a policy issued for the year [281] 1944-45, is that correct? A. Yes.

Mr. St. Clair: The letter of August 24, 1944, is the one that is keyed to those last two exhibits, Your Honor.

The Court: That is Exhibit DD?

Mr. St. Clair: That is right. The August 2nd, 1945, letter, Exhibit JJ, on the letterhead of Fidelity & Casualty Company of New York, F. L. Anderson, Resident Manager, to Bayly, Martin & Fay, reads:

(Testimony of Henry R. Cantlen.)

(Reading Third Party Defendants' Exhibit JJ.)

Mr. St. Clair: Exhibit KK, August 8, 1945, a letter to the Fidelity & Casualty Company from Bayly, Martin & Fay: (Reading Third Party Defendants' Exhibit KK.)

Mr. St. Clair: The letter of August 23rd, 1945: (Reading Third Party Defendants' Exhibit LL.)

Mr. St. Clair: Carbon of a letter of August 24, 1945, to Fidelity & Casualty Company, Exhibit MM: (Reading Third Party Defendants' Exhibit MM.)

Q. (By Mr. St. Clair): Subsequent to those letters, those last letters, Mr. Cantlen, in August, 1945, was a policy issued for 1945-46? A. Yes.

Q. Do you have any independent recollection, outside of those letters, of any negotiations concerning the rate in that year?

A. I don't recall any, offhand. [282]

Q. Now, prior to September 1st, 1946, there is in evidence a letter, Exhibit AA, dated July 22nd, 1946, to Fidelity & Casualty Company, from you. I hand you that letter, to refresh your memory, and ask you if you recall a conversation with a representative of the Fidelity & Casualty Company concerning this 1946-47 policy along about the date of that letter? A. Well——

The Court: What is that letter? A. AA.

Mr. St. Clair: July 22nd, 1946, Your Honor. This is the start of the 1946-47 period now.

A. Well, looking forward to the renewal date of September 1st, 1946, I was interested in having the claim figures in connection with the policy,

(Testimony of Henry R. Cantlen.)

and we hadn't been given the periodic claim reports, so I talked with Anderson——

Q. Mr. Anderson of Fidelity & Casualty?

A. Mr. Anderson of Fidelity & Casualty—that it was necessary that we be furnished these reports so that we and the assured would be familiar with the claim experience.

Q. Then, subsequent to that letter, did you have—I believe you testified you had a conversation with Mr. O'Malley of Fidelity & Casualty Company concerning the California Motor Transport, and I hand you Exhibit BB, the letter of July 31st, 1946.

A. Well, subsequent to this of July 22nd, I received a [283] telephone call from Mr. O'Malley that he would like to talk to me concerning the renewal of the California Transport Line. I went to his office, and I think he called Mr. Mettalia into that meeting, and he started talking about renewal and what they would have to do, or indicated they would have to have more premium, and so forth, so I reviewed the whole history of the line with them, going back to 1941 when we started dealing with Culpepper, and that the line would be renewed from year to year based upon the experience of it. At that meeting I told them that before we could talk about negotiating for renewal I would want the experience brought up to date on all of the policies back to the inception of—back to September 1st, 1941, the date that the line was written with the Fidelity & Casualty. So, as



(Testimony of Henry R. Cantlen.)

a result of that conversation, I received this communication.

Q. That is the letter of July 31st, is that correct?

A. That is correct.

Q. Thereafter, in Exhibit CC, of August 5th, 1946, you received further information, is that correct?

A. Yes. As of August 5th, I wrote them that we wanted the experience brought up to September 1st, or, rather, that is, right up to date as of August 5th. This experience furnished brought it up to April 1st.

Q. Subsequent to the letter of August 5th, which is Cross-defendant's Exhibit CC, did you have a conference with Mr. [284] O'Malley and Mr. Mettalia?

A. Yes, I did.

Q. Do you have in your file a memo of that made at the time of that conference?

A. I believe I have.

Q. Can you place the date of that conference?

A. Yes; it must have been on August 15th.

Q. And where was it?

A. In Mr. O'Malley's office at the Fidelity & Casualty Company.

Q. Was Mr. Mettalia there?           A. Yes.

Q. Did you have with you any of these letters that have been gone into evidence?

A. Yes, I had this letter of July 31st with me, and we reviewed the outstanding cases, and one case in particular was a case known as the Perallto case, on which they had outstanding reserves of

(Testimony of Henry R. Cantlen.)

some \$15,000, so I called for the file on it and the claims man handling the case came in and we reviewed the file, and the claims man felt that there would be no liability, and as a result of that we waded into the experience for \$1,000, figuring there would be no liability there and just would be expense, so that brought the loss ratio down to approximately 122 per cent, and at that meeting they indicated—the Fidelity & Casualty indicated that in view of the carrier increase of 30 per cent that had taken place over all automobile insurance [285] as of January 1st, 1946, and the unfavorable experience that had been seen in the year 1945 to 1946, that they would want approximately a 75 per cent increase in premium, increase over the rate of the former policy, together with writing it, to be used as a standard premium, and that they would only be interested in writing it on a retrospective basis.

Q. At that time, did they give you or did you use, mention, any particular rates, that is, in addition to the 75 per cent increase?

A. Yes, we worked these figures out and used that percentage increase. It brought the standard rate to 2.14. So, from that, and working out the minimum and the maximum, they finally arrived at and said that they would be—they would consider renewing on the basis of a 2 per cent standard for the retrospective and—2 per cent standard for the primary on a retrospective basis, with a one per cent minimum and 3 per cent maximum.

(Testimony of Henry R. Cantlen.)

Q. Are those the figures that are indicated on the memo that you have in front of you that you made at the time?      A. Yes.

Q. All right, now, subsequent to that time, you have testified that you, on August 27th, had a conference with Mr. Coughlin, at which time I believe you testified you took the binder to Mr. Coughlin's office?      A. Yes. [286]

Q. At that time, where was the—it was in Mr. Coughlin's office. Was Mr. Davis there?

A. At the start of the meeting, no, he wasn't. I think he came into the meeting later on.

Q. Prior to going into this meeting, had you taken these figures from the insurance company and made a memorandum of your own?

A. Yes. Prior to going into Mr. Coughlin's office, in order to explain the function of the retrospective plan and to give him the indicated cost under that plan, I took the receipts for the past year, that is, from September until May, which had been reported to us at that time, and projected them, together with the approximate annual gross revenue, and I have—I did this in my office, took these from my files before going to Mr. Coughlin's office.

Q. Did you have that memorandum with you in Mr. Coughlin's office?      A. Yes.

Q. What other memorandum or letters did you have?

A. I probably had the claims reports and I had

(Testimony of Henry R. Cantlen.)

the figures that we worked up at the Fidelity & Casualty Company office.

Q. You had your memorandum of August 15th with you? A. Yes.

Q. And the letter of July 31st, or did you include that? A. What letter is that? July 31st? [287]

Q. That was their answer, this letter, Exhibit BB.

A. Yes.

The Court: A letter in answer to Exhibit AA.

Q. (By Mr. St. Clair): Now, at this conference with Mr. Coughlin on August 27th, Mr. Cantlen, at which time possibly Mr. Davis was there part of the time, what was said and done?

A. I explained to Mr. Coughlin the workings of the retrospective plan, and doing it, I had to make notes in order to illustrate to him the actual cost as it would work out, as the program would work, to him, showing him what his deposit of standard premium was going to be with the rate of 2 per cent times the projected annual gross receipts; what it would be with the minimum application, and what it would be with the maximum application, showing him the various spreads for losses, and explained exactly what his cost would be or could be under this retrospective program.

Q. Do you have in your files any memorandum made of that conversation?

A. Well, I have the pencilled memorandum that I made, explaining the functions and workings of the plan to him.

Q. Was this memorandum made in the presence

(Testimony of Henry R. Cantlen.)

of Mr. Coughlin?      A. Yes, it was.

Q. The document which I have just handed you, and which I have just shown to counsel, Mr. Cantlen, is a piece of yellow pad paper with pencilled notations on it. Are those notations [288] the ones you refer to that were made in the presence of Mr. Coughlin?

A. Yes. This was a method of application of the plan.

Q. Of the retrospective plan?

A. That is right.

Mr. St. Clair: We offer the memorandum, as identified by the witness.

Mr. Murman: To which I object on the ground it is purely speculative, assumes facts not in evidence, not binding on the plaintiff.

The Court: Well, I will admit it.

Mr. St. Clair: You may object, but I am talking about a retrospective plan.

Q. Is that where you took a so-called standard rate like 2 per cent, and agreed if the loss ratio at the end of the year is lower than expected it will reduce, the premium will be reduced to one per cent, and if higher it will be increased to 2 per cent?

A. That is right. Use what you call a basic factor, and take losses and combine your losses with the factor, produce your basic, which is your retrospective plan, bring out the minimum, or certain minimum and maximum.

Mr. St. Clair: I will not attempt to read this,



(Testimony of Henry R. Cantlen.)

Your Honor. It is simply the figures described by the witness.

Q. Further at this conference of August 27th, I believe you testified you left the binder with Mr. Coughlin? [289]

A. Yes.

(The Document Was Marked "Third Party Defendants' Exhibit NN," in Evidence.)

Q. (By Mr. St. Clair): I believe you testified—well, go on; tell us what happened at that conference, in regard to what Mr. Coughlin said and his instructions to you.

A. At that meeting, Mr. Coughlin was still not desirous of entering into a retrospective arrangement. He asked me to continue my efforts to get a guaranteed cost plan, either from the Fidelity Company or to see what I could do with the Fidelity Company, or other markets, on a guaranteed cost basis.

Q. And, pursuant to those instructions, did you attempt to find another market for the risk?

A. Yes, I did.

Q. Can you tell what other companies you solicited?

A. Yes. I attempted to interest the Pacific Indemnity Company.

Mr. Murman: I think it is incompetent, irrelevant and immaterial what other companies he may have sought to interest here.

Mr. St. Clair: This is an agent acting under instructions from the principal. I think we are

(Testimony of Henry R. Cantlen.)

entitled to show he carried out the instructions of the principal in an attempt to find another market and couldn't find one.

The Court: I don't see it is particularly material to the case, myself, each company he solicited. I will allow the [290] question just in a general way, that he solicited. He has already said that, a couple of times, he solicited various other companies and couldn't get them to take the risk, is my understanding of the testimony heretofore.

A. That is correct.

Q. (By Mr. St. Clair): You were not able to find another company that would take the risk?

A. That would take the risk at a more attractive basis than the Fidelity & Casualty Company were offering.

Q. Do you know how many companies you solicited, in number, not naming them?

A. Five or six.

Q. You have testified that subsequent to that, and about September 23rd, you had another conference with Mettalia and, I believe, O'Malley. That was the conference at which they insisted upon the retrospective basis, is that correct? A. Yes.

Q. Subsequent to that, as I understand it, you testified that you took, sometime around the end of September or first of October, you went to Mr. Coughlin's office with the retrospective arrangement? A. Yes.

Q. I hand you the retrospective agreement, Defendants' Exhibit C. At this conference at the end

(Testimony of Henry R. Cantlen.)

of September or first of October, did you discuss that retrospective arrangement with [291] Coughlin?      A. Yes.

Q. Did you go over it with him page by page or in any other way?

A. I went over there and I went over the factors that were established.

Q. What do you mean by the "factors"?

A. In other words, in here, basically, they state that the premium, the retrospective premium, is to be so much, certain percentage of the standard premium. Conventional factor of loss is established; then this goes on, using the computation. Total retrospective premium would be computed, or the losses are adjusted from time to time, and, in other words, under the retrospective plan it goes on until all losses are finally disposed of under the contract.

Q. In these explanations, were you using these figures you have heretofore testified to of one per cent, 2 per cent, and 3 per cent?      A. Yes.

Q. I believe you have testified that Mr. Coughlin still stated he wanted a guaranteed plan, is that correct?

A. Yes. He asked me to leave this with him, that he wanted to look it over and possibly he would want his attorney to look it over, but he was still of the opinion and felt and left the feeling with me that he wanted a guaranteed cost program. [292]

Q. Then you left the retrospective agreement with him?

(Testimony of Henry R. Cantlen.)

A. And I told him that we would make efforts to attempt to secure a guaranteed cost program.

Q. And you did continue such efforts?

A. Yes.

Q. Were you able to get one? A. No.

Q. I refer you to your file and a letter of October 29, 1946. Do you have a letter to the F. & C. in your file of that date?

A. Yes. That was to us.

Mr. St. Clair: I offer in evidence a letter, as identified by the witness, dated October 29, 1946, addressed to the Bayly, Martin & Fay, from the Fidelity & Casualty Company of New York.

(A Document Was Marked "Third Party Defendants' Exhibit OO," in Evidence.)

Mr. St. Clair: This letter, Exhibit OO, dated October 29th, on the letterhead of the Fidelity & Casualty Company of New York: (Reading Third Party Defendants' Exhibit OO.)

Q. Using that exhibit, Mr. Cantlen, did you solicit information on that point from the assured?

A. Yes. Yes, I contacted Mr. Davis by telephone and called this to his attention, and he advised me that the only filing with the ICC was on California Motor Transport Company, Ltd., Docket 15506.

Q. But the letter itself was not sent to Coughlin? [293] A. No.

Q. You have in your file a series of letters around November, 1946, having to do with the

(Testimony of Henry R. Cantlen.)

American Manganese Company. Do you have those before you?           A. Yes.

Q. That consists of a letter dated October 23rd from the American Manganese Steel Division to California Motor Transport Company, Ltd.; letter of November 5, from California Motor Transport Company, Ltd., to Spengler & Johnstone, Inc., attention Mr. Henry Cantlen; and letter dated November 18, to American Manganese Steel Division, carbon copy, from California Motor Transport Company, Ltd. Those are the three letters to which you refer as the Manganese? While they are looking at that, Mr. Cantlen, I show you Defendants' Exhibits D, E, F and G, which were marked for identification, which consist of checks of Bayly, Martin & Fay, and in each case two forms attached to the check. Will you identify those, in each case, as coming from your files, and as being from the files of Bayly, Martin & Fay?

A. Yes. This is a copy of the statement form that would accompany the check to the insurance company, and these are——

Q. "These"? That first one——

A. Form 3470, standard form. These two are what we call——

Q. That is, the two unnumbered?

A. We have invoice numbers on them. They are our own office [294] records.

Mr. Murman: Is that part of the exhibit for identification?

Mr. St. Clair: Yes.



(Testimony of Henry R. Cantlen.)

Q. Is that number on all four exhibits, Mr. Cantlen?           A. Yes.

Q. You identify them all as such?

A. Yes. This is a copy of our Accounts Payable.

Mr. St. Clair: Mr. Eisner didn't see fit to offer these, Your Honor, so I will offer them. If they may keep that same number, then we won't be confused.

The Clerk: Defendants' Exhibits D, E, F, G, heretofore marked for identification, are admitted in evidence.

(Documents Marked "Defendants' Exhibits D, E, F, and G" Were Offered and Received in Evidence.)

Mr. St. Clair: We offer the three letters, as identified by the witness, as one exhibit, Third Party Defendants' Exhibit next in order.

(Documents Were Marked "Third Party Defendants' Exhibit PP," in Evidence.)

Mr. St. Clair: The letter of October 23rd, 1946, is on the letterhead of American Manganese Steel Division, to California Motor Transport Company, Ltd.: (Reading.)

The letter of November 5th, 1946, is on the letterhead of California Motor Transport Company, Ltd., to Spengler & Johnstone, Inc.: (Reading.) [295]

The letter of November 18, 1946, to American Manganese Steel Division, with a carbon copy to California Motor Transport Company, Ltd., reads: (Reading.)

(Testimony of Henry R. Cantlen.)

The Court: That is signed by——

Mr. St. Clair: Mr. Mettalia—no, Mr. Cantlen; and copy sent to California Motor Transport. It states in there the policy expires September 1st, 1947, in that letter dated October 18, 1946.

Q. Now, after you had left the retrospective agreement with Mr. Coughlin, you continued to try to find a market? On or about November 13th, were you solicited by the Fidelity & Casualty Company concerning the retrospective agreement?

A. Yes, they wrote this letter.

Q. You received this letter which you now hand me? A. Yes.

The Court: What is the date of that letter?

Mr. St. Clair: November 13, 1946. We offer in evidence the letter identified by the witness as next in order.

(A Document Was Marked "Third Party Defendants' Exhibit QQ," in Evidence.)

Mr. St. Clair: This letter is on the letterhead of Fidelity & Casualty Company of New York, addressed to Bayly, Martin & Fay, 114 Sansome Street, re California Motor Transport Policy No. SPL-20968. (Reading.)

Q. On or about the date of this letter, Mr. Cantlen, did you [296] have any telephone or other conference with Mr. Mettalia concerning this retrospective agreement?

A. No, I don't recall any conversation with Mr. Mettalia.

Q. When you received this letter——

(Testimony of Henry R. Cantlen.)

The Court: Who is that Exhibit QQ to? From the plaintiff to Bayly, Martin & Fay?

Mr. St. Clair: Yes, sir.

Q. When you received this letter on November 13 did you discuss it with Mr. Coughlin?

A. Yes. I attempted to get in touch with Mr. Coughlin, and my best recollection, he wasn't available, or I called him and he said he would get in touch with me in a few days, but we were not able to get together. Whether he couldn't see me at that particular time, or he was out of town, or not available, I don't exactly recall.

Q. Then did you receive, on or about December 11th, from the F. & C., a letter? A. Yes.

Q. Is that the letter which you now hand me?

A. Yes.

Mr. St. Clair: We ask that letter dated December 11, 1946, as identified by the witness, be admitted in evidence as next in order.

(The Document Was Marked "Third Party Defendants' Exhibit RR," in Evidence.) [297]

Mr. St. Clair: This letter, Your Honor, reads as follows: (Reading.)

Q. Mr. Cantlen, upon receipt of that letter of December 11th, what did you do, if anything?

A. I contacted Mr. Coughlin. My recollection, it was by telephone. And he told me definitely that he would not enter into the retrospective plan, so then I conveyed the information to the Fidelity & Casualty Company.

Q. To whom there, do you know?

(Testimony of Henry R. Cantlen.)

A. Mr. Anderson, by telephone.

Q. Subsequent to that time, did you have any—withdraw that. Subsequent to that letter, did you make any continued effort to find a market?

A. Yes. There was a thirty-day notice, so we still had time to work on the program, and I continued my efforts in the local market, and also I engaged facilities of our Los Angeles office to see if they couldn't endeavor to secure a market.

Q. Did you advise Mr. Coughlin of that?

A. Yes; I told him I was continuing to attempt to get a market on the guaranteed cost basis on a rate that we felt was commensurate for the risk.

Q. During this period between the time of the notice of cancellation and the actual cancellation of the policy, do you recall any conference in Mr. Coughlin's office, where a gentleman by the name of Simpson was present—some such name? [298]

A. Yes.

The Court: You mean before or after the cancellation?

Mr. St. Clair: After the notice of cancellation and before the cancellation.

Q. Sometime during that month? A. Yes.

Q. Can you place the time of that?

A. Well, it was previous to January 17th. Mr. Coughlin told me he was considering and entertaining the idea of going into the Transport Insurance Exchange.

Q. That is a reciprocal company?

A. Yes. We had considerable talk about it.

(Testimony of Henry R. Cantlen.)

Q. That is, you and Mr. Coughlin? A. Yes.

Q. When and where?

A. In his office. All this was prior to the meeting, after the cancellation had been served and prior to the meeting with Mr. Simpson, and we were interested in assisting Mr. Coughlin. He was our client, and we were duty-bound to help him wherever we could. So he thought it would be advisable——

Q. He said this to you?

A. Yes. He said he would arrange to have Simpson come in, and the three of us would have a meeting.

Q. Who is Simpson?

A. Mr. Simpson is the General Manager for this Transport [299] Insurance Exchange, which Mr. Coughlin was contemplating going into. We held a conference and——

Q. This is the one at sometime prior to January 17?

A. Yes. ——and I asked Mr. Simpson some questions.

Q. Who was there?

A. Mr. Coughlin and myself and Mr. Simpson.

Q. Anyone else?

A. Not to my recollection. And there was some questions that I wanted to ask Mr. Simpson and get an explanation, and I made some recommendations, and subsequently I told Mr. Coughlin there were certain points I wanted to clear in my own mind, and I thought it would be advisable for him



(Testimony of Henry R. Cantlen.)

to have them cleared, so I requested an opinion from our attorney on some of these points concerning the reciprocal company and the obligations of a subscriber, power of attorney, and I forwarded a copy of that to Mr. Coughlin under date of January 18, 1947.

Q. Did you have any subsequent conversations with Mr. Coughlin on this matter, that is, in the next few days, before the cancellation?

A. Yes. On, I would say, the 17th of January, or the 16th, I had a further meeting with Mr. Mettalia, and I asked him if he thought that if I could get a firm order from the assured for a guaranteed cost plan at a rate, would he submit it to New York for their approval. Mr. Mettalia told me he would submit it, but he held little, if any, hope that they would consider it. [300] I then went to Mr. Coughlin's office and asked him if he would give me a firm order at a rate of 1.75, that I would like to submit it on the firm basis to Fidelity & Casualty Company, and at that time he told me that he had subscribed or entered into the agreement with the Transport Insurance Exchange and they were to take over the insurance as of the effective date of the cancellation of the Fidelity & Casualty Company.

Q. There has been testimony that in April of 1947 you received a copy of the final audit, but that you got it from the Fidelity & Casualty Company. Subsequent to receiving that document, which is contained in Plaintiff's Exhibit 13, did

(Testimony of Henry R. Cantlen.)

you have any conversation with the Fidelity & Casualty Company concerning it?      A. Yes.

Q. Where was it and with whom was it?

A. That was at the Fidelity & Casualty Company. My first meeting was with Mr. Mettalia, after receiving this final audit statement.

Q. What was said?

A. I objected to the rate charged in this final audit, and contended that the rate of 2 per cent for the primary should not apply at the earned premium because the rate of 2 per cent was only—was to be used in connection with the retrospective agreement, or retrospective agreement basis, and I felt that they were not charging a correct premium in applying the 2.20 [301] rate for the over-all coverage.

Q. What did Mr. Mettalia say?

A. Mr. Mettalia didn't agree. He contended that had the company entertained the business on the guaranteed rate basis, that the rate would have at least been 2.20.

Q. By the way, this insurance that was placed by Mr. Coughlin through Mr. Simpson, were you or your firm brokers on that?      A. No.

Q. There is evidence that on July 24, 1947, another statement was issued by the F. & C. on this amount that was due. Did you have any conversations with the F. & C. concerning that?

A. Yes.

Q. With whom was that?

A. I had a further meeting with Mr. Mettalia, and we were—we went over into Mr. Anderson's

(Testimony of Henry R. Cantlen.)

office to review the whole situation again, and I made the same contention, that I did not feel that the insurance company was entitled to use a 2.20 rate basis because that basis was to be used in connection with the retrospective agreement, and that my assured had never agreed to a 2.20 rate on a guaranteed basis, and that in view of the retrospective agreement not having been signed and entered into, that I could not agree with them that they were entitled to a 2.20, which would have been the standard rate under the retrospective plan.

Mr. Murman: What is the date of this statement? [302]

The Court: That was in July of 1947, practically a repetition of what he said. A. That is right.

Mr. St. Clair: Yes. I am trying not to be repetitious, Your Honor.

Q. Then, this letter of August 7th, Exhibit 17, which you transmitted personally, and so forth, and which you testified was delivered on October 22nd, and you testified in some detail as to what was suggested, and the letter of October 22nd, which was Exhibit 18—after you had this letter of October 22nd, did you use it again, or use it with the insurance company?

A. Yes. I had a further meeting with Mr. Anderson. I think Mr. Mettalia was there. Mr. Anderson, after that meeting, said he would take the thing under consideration and would advise me of his findings.

Q. And that letter is already in evidence, saying

(Testimony of Henry R. Cantlen.)

that they would not change their position?

A. Yes. No, here it is here.

Mr. Murman: I think there is a quotation from it.

A. The quotation is incorporated, but there it is.

Mr. Murman: It is quoted in Plaintiff's Exhibit 19, I think, Your Honor.

Mr. St. Clair: There is no use burdening the record with the exhibit, as long as it is quoted.

Q. Why did you not deliver the letter of August 7, 1947, Exhibit [303] 17, until October 22nd, 1947?

A. Well, I was still going back and forth with the Fidelity & Casualty Company, and I had really hoped to work out a compromise rate at which the thing may be compromised, or which I felt might be an equitable rate to suggest to my client to pay.

Q. You testified previously it was your practice to turn clients' money over to the insurance company the next month after you received it. The evidence showed you received the premium for September, 1946, in November, 1946, but did not turn it over to the insurance company until January, 1947, apparently a lapse of a month from your standard practice. Do you have any explanation of that?

A. Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed, as far as we were concerned; there was no agreement; the assured had not consented or

(Testimony of Henry R. Cantlen.)

agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.

Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn't deliver the policy to Mr. Coughlin when you received it in October, 1946?

A. I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective [304] agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned.

Mr. St. Clair: That is all the questions I have at this time, Your Honor, from this witness.

The Court: Maybe the reporter needs a little rest. We will recess for five minutes.

(Thereupon, a short recess was taken.)

Mr. St. Clair: We have finished with this witness, Your Honor.

### Cross-Examination

By Mr. Eisner:

Q. The questions I asked before and you objected to because they were not proper cross-examination of your witness, I may ask now.

Q. Mr. Cantlen, did you make any endeavor to



(Testimony of Henry R. Cantlen.)

collect the deposit premiums called for by Policies 20950 and 20968?

Mr. Murman: To which I object, as I have heretofore, that as far as the plaintiff is concerned it is all incompetent, irrelevant and immaterial, not within the issues of this case.

The Court: Overruled.

A. No, I did not.

Q. (By Mr. Eisner): Did Bayly, Martin & Fay receive any bill from Fidelity & Casualty Company for this—for these deposit premiums under these policies? [305]

Mr. Murman: Same objection. May my objection run to all this line of testimony, Your Honor?

The Court: Yes.

A. They may. They usually send a short statement with the policies, Mr. Eisner. Whether they did or not in this instance, I can't actually remember; but if they did, we would ignore them, because we do our billing from the policies themselves, not from any statement.

Q. Have you any recollection, Mr. Cantlen, at any time, of Fidelity & Casualty Company having asked or demanded the deposit premiums from Bayly, Martin & Fay? A. No, they did not.

Q. Or made any inquiry of Bayly, Martin & Fay whether or not Bayly, Martin & Fay had collected the deposit premium from the insured?

A. No, they did not.

Q. Calling your attention to Exhibit DD, that is, a letter addressed to California Motor Transport

(Testimony of Henry R. Cantlen.)

Company on August 24, 1944, with reference to the policy that would become effective on September 1st, 1944, is that correct?      A. That is correct.

Q. And on August 24, 1944, prior to the time of the expiration of the policy then in effect, you forwarded to California Motor Transport Company the new policy for the succeeding year with your letter of August 24, 1944, is that correct? [306]

A. I sent the renewal policy with this letter of August 24th.

Q. That is right, you sent the renewal policy with your letter of August 24th, 1944.

A. Correct.

Q. In this same letter of August 24th, 1944, in which you enclosed the renewal policy, you also enclosed your invoice for the deposit premium under the policy that would become effective on September 1st, 1944, did you not?

A. That is correct.

Q. And you state in this letter a remittance in due course would be appreciated?

A. That is right.

Q. Was this letter, the practice followed in 1944, the same practice you had been following in collection of deposit premiums in other instances?

A. Yes, sir.

The Court: He has testified to that before.

Mr. Eisner: I think that is all, if Your Honor please.

(Testimony of Henry R. Cantlen.)

Cross-Examination

By Mr. Murman:

Q. Mr. Cantlen, you mentioned, in answer to a question put to you by Mr. St. Clair, some discussion about the Peralta case in a conference on August 15, 1944, in Mr. O'Malley's office. Do you remember that remark? A. Yes.

Q. If I remember your testimony correctly, the discussion, [307] there was around \$15,000 reserve at that time, and it was reduced to \$1,000, following which there was a figuring of the premium that would be considered in connection with renewal, and it was then you talked about the retrospective agreement 1, 2, and 3 arrangement, is that right?

A. Well, you are pretty well mixed up.

Q. Didn't those things take place at that conference?

A. Yes, but you haven't got it straight.

Q. All right, you tell me.

The Court: I think the court has it straight.

A. It is in the record.

The Court: He called on the claims man and they discussed the Peralta case, \$15,000, and decided to reduce that to approximately \$1,000 because there wasn't any liability, and so reducing it, they then raised the tentative figure.

Mr. Murman: And the loss ratio was then figured at 185 per cent.

The Court: Yes.

Q. (By Mr. Murman): Going forward to the

(Testimony of Henry R. Cantlen.)

time you talked with Mr. Mettalia in January, 1947, regarding guaranteed cost basis——

A. Yes.

Q. ——didn't Mr. Mettalia at that time tell you about the disposition of the Paralta case?

The Court: When was that?

Mr. Murman: In January, 1947, Your Honor.

A. No, I don't think so.

Q. (By Mr. Murman): Did he subsequently tell you about the disposition of the Peralta case?

A. Yes.

Q. When did he tell you about that, according to your best recollection?

A. I don't know when it was, but it was after it was disposed of, whatever that date was, or after the trial of it. I don't recall the date.

Q. It was during this time following the cancellation of the policy and the discussions concerning the final audit and the payment of premiums, and so on?

A. That is true, it was in that interim period that that case was disposed of.

Q. Did he tell you that——

The Court: What period is that between?

Mr. Murman: Following the cancellation of the policy, Your Honor, and during the period of final audit discussions and the discussions concerning the premium rate.

Q. Isn't that right, Mr. Cantlen?

A. Yes, it was after the cancellation took effect

(Testimony of Henry R. Cantlen.)

and between January 19th and, let's say, August, somewhere in that period.

Q. Yes. Of 1947? A. That is right.

Q. Did he tell you that the defendants had had a judgment against [309] them for \$71,000 in that case? A. Yes.

Q. Did he also tell you that under those conditions they couldn't possibly consider a renewal at any less than the rate they had previously discussed with you?

A. The thing was all over then.

Q. But I mean, you were trying to work out a compromise at that time?

A. Yes, we were trying to work out a compromise rate at that time, but I don't see that that had any bearing on the earned premium.

Q. Going back to the first policy that was issued, where you had Lloyd's on the excess, I believe you testified the total premium was 1.21, including the excess?

A. The totals, yes. 1.221, wasn't it?

Q. 1.21 I have in my notes.

The Court: I have 1.21.

A. I think it is 1.21.

Q. (By Mr. Murman): Anyway, Mr. Cantlen, when the F. & C. took over both primary and the excess, I think you said it was on the renewal of the 1947 contract?

A. No, it was as of October 1st, I think, 1943, and the correct over-all rate was 1.21, but waiving the tax factor on your London premium, which you



(Testimony of Henry R. Cantlen.)

have to add on, and a rate of 1.23 with F. & C. was comparable to 1.21, plus your taxes. [310]

Q. I see. Actually, it was about the same, with the tax? A. Yes, over-all cost.

Mr. Murman: I have no further questions.

Mr. Eisner: Nothing further.

Mr. St. Clair: Nothing on redirect examination, Your Honor.

(Witness excused.)

Mr. Eisner: Are you resting, Mr. St. Clair?

Mr. St. Clair: Yes. [311]

#### Note

[Note: Pages 312-326, covering testimony of James C. Coughlin given on Oct. 11, 1949, inadvertently omitted from this place is set forth in the Supplemental Transcript of Record on pages 399 to 413.]

#### JAMES C. COUGHLIN

resumed.

#### Cross-Examination

#### (Continued)

The Court: Mr. Coughlin was on the stand and being cross-examined by Mr. Murman.

Mr. Murman: I think I had completed my cross-examination. Mr. St. Clair, I believe, has some questions.

By Mr. St. Clair:

Q. Mr. Coughlin, did I understand that you had been President of the defendant since 1930, or somewhere in that region? A. Yes.

(Testimony of James C. Coughlin.)

Q. And are you an owner? I mean, do you own companies or part of them? A. Yes, I do.

Q. Have you been in that position during all since 1930? A. I would say yes.

Q. During that period of time, have you handled the insurance for these companies which are the defendants here? A. Yes.

Q. You testified that the gross receipts, rather, gross premiums, were thirty or forty thousand dollars a year, I believe?

A. That is just approximate.

Q. Yes. Have these been substantial during all these years, [327] these insurance premiums; that is, have they been large sums?

A. I would say they varied, due to the gross receipts, of course.

Q. You will recall you testified that Mr. Cantlen, around August 27th, delivered to you a binder, copy of which I now hand you, Defendants' Exhibit B, your own exhibit. Do you recall that testimony on your part?

A. Yes, I do. He handed me this, together with a letter.

Q. That is correct. At that time, did you read this document which you now have in your hand—copy of which you now have in your hand?

A. No, sir.

Q. You had been handling insurance for a long period of time? A. Yes, sir.

Q. Do you know what a binder is?

A. Well, I do and I don't, I suppose.

(Testimony of James C. Coughlin.)

Q. In any event, you did not read that document which you have in your hand?

A. I did not, but I do know a binder gives you coverage until a policy is issued.

Mr. St. Clair: I move to strike that answer as unresponsive and a conclusion.

Mr. Murman: You have asked for it.

The Court: I can't do that, because you asked him.

Mr. St. Clair: All right. [328]

Q. Mr. Coughlin, did you turn the binder over to anyone in your organization?

A. Mr. Davis, yes.

Q. Did Mr. Davis make any kind of report on it to you?      A. No, sir.

Q. Just so that I may understand it correctly, you proceeded on the understanding that the old policy SPL-1457 was continued in existence by this binder, is that correct?

A. That is correct. In fact, I asked, at that particular time, when the binder was given me, of Mr. Cantlen if there was going to be any additional charge for that binder, and he said no, that he has an arrangement with F. & C. to carry that under the old rate during negotiations.

Q. Yes, and for how long?

A. Didn't mention a period of time.

Q. And you didn't ask him?

A. No, sir. During the negotiations, he mentioned, yes.

Q. You relied on that?      A. I did.

(Testimony of James C. Coughlin.)

Q. You didn't read that written document?

A. No, sir.

Q. You didn't personally know it stated on its face what it was good for? A. No, sir.

Q. Do you know now, as you sit there? [329]

A. No, sir, I do not.

Q. Would you take my word for it, it says sixty days, it is good for sixty days.

A. If you say so, yes.

Q. At the end of sixty days, did you instruct Mr. Cantlen to make any attempt to extend this binder?

A. No, sir. When he came up, he stated then he was still negotiating with F. & C.

Q. Do I understand it is necessary in your business for you to have insurance, that is, necessary by reason of the rules of the ICC and Public Utilities Commission? A. Yes.

Q. And also, I assume, without insurance, you risk catastrophe, that is accidents. You were aware of that risk, I assume?

A. Yes, indeed, but we had no trouble placing insurance.

Q. I just want to be sure I understand this. So that you didn't read the binder, didn't know how long it extended, and that you took some verbal statement from Mr. Cantlen that 1457 was continued indefinitely?

A. I read it slightly, yes, that accompanied with this binder.

Q. Well, you were satisfied, as a business man, to rely on its wording, is that right?

(Testimony of James C. Coughlin.)

A. Well, I think so, and also what Mr. Cantlen did tell me at the same time.

Q. Are you familiar with the fact that certain of the customers [330] or clients, or whatever you call them, that you serve, require certificates showing you are insured? You are familiar with that fact, are you?

A. Yes, I am.

Q. I hand you Third Party Defendants' Exhibit PP, letter November 18, 1946, with reference to the American Manganese Steel Division, certificate of insurance. You observe that is a letter to the American Manganese Steel Division?

A. Yes.

Q. Attached to it is a letter from you.

The Court: That is Exhibit what?

Mr. St. Clair: Exhibit PP, Your Honor.

A. Yes.

Q. I will refer you to the letter, a carbon of which went to the California Motor Transport Company, Ltd., and call your attention to the fact that the statement in there is that your insurance expired September 1st, 1947. Do you see that statement in the letter?

A. Yes, I do. I didn't receive this letter.

Q. Did anyone in your organization?

A. I suppose Mr. Davis did. I didn't receive it.

Q. Did Mr. Davis call this letter to your attention?

A. Not that I recall.

Q. Was it your routine in details of insurance, is Mr. Davis the man that would do that insurance business? [331]

A. Majority, yes.

Q. Though you had handled the broad company policy?

A. Yes.



(Testimony of James C. Coughlin.)

Q. Mr. Davis didn't call your attention to this remark that your insurance ran out September 1st, 1947? A. Not to my knowledge, no.

Q. Would you think that would have been within his duties to call that to your attention? When I ask you that, I don't want to trap you. I call your attention that this is after the sixty days.

Mr. Eisner: I think it is entirely incompetent, irrelevant and immaterial, if the Court please, whether or not it would have been within the duties of Mr. Davis. It calls for a conclusion of the witness.

The Court: I don't think so. I will allow the question.

A. Perhaps he didn't notice the answer. As I say, it is just a matter of routine. They send it to you, you send it to the insurance company.

Q. That is, within your company, it was just a matter of routine whether you had insurance or not?

A. Oh, no, indeed not.

Q. Was Mr. Davis acting under your direction and control during this period of time?

A. He does, yes. [332]

Q. You testified, Mr. Coughlin, that sometime prior to, I believe, July, 1946, you discussed with someone named Simpson the matter of the possible insurance in the Transport Insurance Exchange, is that correct? Is that your testimony?

A. That is right.

Q. At that time, were you familiar with the method of operation of an inter-insurance exchange such as the one in question?

(Testimony of James C. Coughlin.)

A. Somewhat, yes.

Q. Were you shown the actual type of document you were required to sign? Were you shown those in July, 1946?

A. No, sir.

Q. But you understood how the reciprocal worked in general?

A. In general. Some of the other carriers, prior to our joining up with this particular company, had insurance with them, yes.

Q. You discussed it with your fellow carrier friends?

A. Yes, and attorneys, that is right.

Q. And—it is jumping ahead of myself a little—were you familiar with the fact that in this particular inter-insurance exchange you were required to sign a side agreement, as it were, with regard to how you fix the amount of premium?

A. Well, I knew there was a difference between the payment.

Q. Did you know you had to sign an agreement besides the [333] policy in which it was decided how the premium would be fixed?

A. I believe I signed it, yes.

Q. But you knew that in July, didn't you, that you would have to do that?

A. No, I didn't.

Q. When did you first learn of that?

A. After the cancellation in December of 1947, I told Mr. Cantlen I was going to put it in the hands of the Truck Transport Exchange.

Q. I show you your own Defendants' Exhibit "C," Mr. Coughlin, which is the retrospective agree-

(Testimony of James C. Coughlin.)

ment, hand that document to you and I understand from your previous testimony that you stated Mr. Cantlen came to your office with that document and some other papers and——

Mr. Eisner: Just a moment, I don't think there were any other papers.

Mr. St. Clair: Well, I believe he testified there were some other papers. If you would like me to, I will confront him with his testimony. Well, I take it back.

Q. Were there any other papers in Mr. Cantlen's possession at the time he handed you this retrospective agreement? A. Not to my knowledge.

Q. And what was the conversation with regard to that retrospective agreement that you have in your possession now? [334]

A. Mr. Cantlen went on to explain the workings of this retrospective agreement—I never heard of those before, never knew what it meant—and as he was going through it, I said, “Why, Henry, give me the substance of it, what is it costing the company in dollars and cents?” “Well,” he said, “Jim, it will cost your company \$26,000.00 total.” I said, “Is that regardless of our loss ratio?” He said, “Yes, the company has to have a net \$26,000.00, and could cost you a maximum of \$80,000.00.” So, I said, “Henry, the cost of the insurance now is around \$30,000.00. For \$4,000.00, how could I subject our company to a loss of \$50,000.00 more?” I said, “I can't accept the retrospective policy.” He said, “All right, Jim, I am still negotiating with the F. & C.”

(Testimony of James C. Coughlin.)

Q. What in general were your gross receipts at that time?           A. I don't recall.

Q. Would you repudiate the suggestion from another witness that it was around \$1,700,000.00 a year?

A. No, sir.

Q. Would that be approximately right?

A. I wouldn't know.

Q. Who would know?           A. Mr. Davis.

Mr. St. Clair: Is he going on the stand?

Mr. Eisner: Yes. [335]

Q. (By Mr. St. Clair): He will be able to tell me that fact?           A. He should.

Q. You don't know what your approximate gross revenue was?

A. Not off-hand. Our gross receipts have been varying each year.

Q. I hand you Third Party Defendants' Exhibit "NN," and in order to refresh your memory, in case you didn't hear the testimony, Mr. Cantlen testified he had that document with him—made that document on your desk at the time he explained, or attempted to explain the retrospective agreement to you. Do you have any independent recollection as to whether Mr. Cantlen made any notations in front of you?

A. At times when Henry comes up, he would be across the desk. I wouldn't see the figures. Perhaps when I asked him, "How does this work in dollars and cents to the company?" Perhaps in his memorandum he may have worked it out, but I didn't see the figures. He may have worked it out for the purpose of telling me the minimum and maximum.

(Testimony of James C. Coughlin.)

The Court: What is the number of that Exhibit?

Mr. St. Clair: It is Exhibit "NN."

A. I don't remember seeing the Exhibit itself, no, sir.

Q. (By Mr. St. Clair): But you wouldn't say it wasn't made?

A. I wouldn't say that, but I never saw it.

Q. But did you know at that time, or do you recall Mr. Cantlen [336] explaining to you the maximum of \$3.00 a hundred?

A. No, sir, nothing mentioned as far as dollars other than the \$26,000.00 and \$80,000.00.

Q. I am interested in this \$80,000.00. Just how do you suppose that was arrived at?

A. As I say, I wouldn't know.

Q. Would you care to make a computation as to what three percent times your gross receipts would be?

A. No, sir.

Q. You have made no such computation?

A. No, sir. Whatever he did, I told him I wasn't satisfied—the retrospective agreement was not satisfactory to me, and I made no bones about it.

Q. He showed it to you, didn't he? He handed you Defendants' Exhibit "C"?

A. He had it. I saw it.

Q. He left it with you, didn't he?

A. Yes, right on my desk.

Q. As you say, he attempted to explain to you, or explained to you, how it worked?

A. I asked him. He was explaining it, yes, and I asked him, "Henry, that is all Greek to me." I said,



(Testimony of James C. Coughlin.)

“Tell me what it costs our company in dollars and cents.”

Q. Now, Mr. Coughlin, I call your attention to the first page of that document that was handed you at the time, and [337] observe that it refers to a particular policy number SPL 20968. Did you observe that at that time?

A. No, sir, never observed at any time. In fact, I never read it all the time it was in my office.

Q. You never read the agreement?

A. No, sir.

Q. Did you turn this over to anyone in your organization?           A. No, sir.

Q. Did Mr. Davis see this document?

A. No, sir.

Q. So that it never got out of your possession?

A. That is right.

Q. You never read it?           A. That is right.

Q. Never noticed it had the new policy number 20968 on it?           A. No, sir.

Q. You took no interest in it at all?

A. I didn't want it. Why should I take an interest in it?

Q. And you didn't inquire whether you were covered in the binder?

A. I know I was told I was covered in the binder on August 27th.

Q. At my request, your counsel furnished me three or four documents—which I have never seen until this moment, Your Honor—which purport to

(Testimony of James C. Coughlin.)

be the policy issued by the [338] Transport Exchange.

Mr. St. Clair: If I may be permitted a second?

The Court: Do you want to take a recess, Mr. St. Clair?

Mr. St. Clair: No, I am just looking for one document, Your Honor. It will take me just a moment.

Q. I hand you these documents, that your counsel just gave me, and ask you if you are able to tell me whether or not these are all the documents that were signed by you or by the Transport Exchange? Well, your counsel now has handed me—obviously those are not all of them. I hand you another document entitled, “Profit Sharing and Premium Determination Agreement,” and ask you if you have ever seen that document before? A. Yes.

Q. And was that signed by you on behalf of the Defendants here? A. Yes.

Mr. St. Clair: I ask that this “Profit Sharing and Premium Allowance Agreement,” with those things, those Addendum “1” and Addendum “2,” as identified by the witness, go in evidence as Third Party Defendants’ Exhibit next in order.

Mr. Eisner: We will object, if the Court please, that this is incompetent, irrelevant and immaterial for this reason, [339] that the only materiality that I can find and the reason, in the insurance that was placed by the California Motor Transport Company—I asked Mr. Coughlin was he in a position and did he have an agreement he could place with the Insurance Exchange, this insurance at the same rate prior

(Testimony of James C. Coughlin.)

to the time and at the time that the original insurance expired.

Mr. St. Clair: If you are arguing the question before you put the question to the witness——

Mr. Eisner: I am not putting a question, I am arguing my objection.

Mr. St. Clair: The reason I am offering it, this witness deliberately testified he could get insurance at this same rate. I want to show in a reciprocal that you can't possibly know what the rate is. It is impeaching the witness.

The Court: He testified, as I recall it, that up to the time the binder was issued, he could get insurance at the same rate, and that at even up to the time of the cancellation, he could get insurance at a few cents more.

Mr. St. Clair: That is correct.

Mr. Eisner: Substantially, yes. The insurance he could get at the same rates was at the time the binder was issued, and at the time the original insurance expired, and that, in my opinion, is the only period.

The Court: He went further than that and said at the time, Mr. Eisner, the insurance was cancelled, he could get [340] it at a few cents more, that he went to Simpson and Simpson told him he could get it at a few cents more.

Mr. St. Clair: That is exactly correct.

Mr. Eisner: That is substantially correct.

Mr. St. Clair: Is it admitted in evidence?

The Court: Yes.

(Testimony of James C. Coughlin.)

(A document was marked Third Party Defendants' Exhibit No. "SS" in evidence.)

Mr. St. Clair: As a matter of fact, I suspect I better enter them all as Exhibit No. "SS." They are all part of the same transaction.

The Clerk: I will mark this "SS-1" then.

Q. (By Mr. St. Clair): This document, Mr. Coughlin, is entitled, "Power of Attorney," and I ask you if that is your signature on there, and if you signed that? A. It is.

Mr. St. Clair: We offer this as Third Party Defendants' Exhibit "SS-2."

(Document was marked Third Party Defendants' Exhibit "SS-2" in evidence.)

Q. (By Mr. St. Clair): I show you what purports to be a document, original of Policy 28-001, and ask you if that was the policy issued in connection with the profit-sharing and premium determination agreement and power of attorney?

Mr. St. Clair: Do you want to stipulate these in, Mr. [341] Eisner?

Mr. Eisner: Yes, they are identified. They are offered as one Exhibit, I take it?

Mr. St. Clair: We offer that——

Mr. Murman: They are all "SS."

Mr. St. Clair: We offer that as "SS-3" and what apparently is some sort of excess, shows a small premium, as "SS-4."

The Court: Received.

(Documents were marked Third Party De-

(Testimony of James C. Coughlin.)

Defendants' Exhibits "SS-3" and "SS-4" in evidence.)

Q. (By Mr. St. Clair): Are you familiar with those documents? Do you know how the premium is determined under it?

A. Well, to a certain extent, that the maximum we could get stuck for is one month's premium.

Q. That is your interpretation of it, any way?

A. Yes.

Q. That is what you say these mean, do you?

A. That is right.

The Court: That means that you considered that this policy could be cancelled at the end of any month?

A. No, that was in case of cancellation, we couldn't lose anything, but might our company go broke or something, the best we could be stuck for is one month's premium, but there had to be bankruptcy in the company, I believe, before that [342] could happen.

Q. Yes, but as far as the accidents, day by day accidents, if we may call it that, under this premium determination agreement, do you understand you pay for those losses plus 13 per cent?

Mr. Eisner: Just a moment. I think those documents speak for themselves, if the Court please. I don't think it is proper to argue with the witness about the contents of the document.

Mr. St. Clair: Withdraw the question.

Q. I show you, Mr. Coughlin, page 2 of Defendants' Exhibit "SS-1," and ask you if you read that page before you signed the agreement?



(Testimony of James C. Coughlin.)

Mr. Eisner: Just a moment, Mr. St. Clair, that page you are showing the witness, just to show the unfairness of trying to read one document without—it is governed and controlled by a page of the policy itself, which is another part of this Exhibit, they being parts of one transaction, and which limits specifically any liability for premium in addition to the premium that is specified, to a maximum of the deposit premium, and the deposit premium is a total of \$2,500.00 under one policy, which is the primary policy, and \$500.00 under the other policy, which is the excess, so that the maximum, while there is an opportunity for dividend in the case of premium, the earned premium should be less than [343] the premium that was paid. The maximum of liability in the event of cancellation of the insurance by the insured would be the deposit premium.

Mr. St. Clair: Mr. Eisner has given an argument of the points I can't let go unchallenged. As I am one of the few attorneys in the State that had to go through the California Hawaian Indemnity Exchange matter, I know what I am talking about. I know the liability that would ensue if the Exchange went broke. I am talking about the rate. He has been testifying about the rate all along, and I am asking him, not what his liability was if the Exchange went broke, but what his rate, what he had to pay, and the page I showed him, page 2 of that document, fixes the rate.

Mr. Eisner: I must admit I haven't had the experience you have had nor am I an expert in this

(Testimony of James C. Coughlin.)

matter, but I have read the agreement, and I did so in conjunction with the policy, and while I may be in error, it is my opinion, and I have so stated to the witness, the maximum liability would be the deposit. I think if I show it to you, I am inclined to think you will agree with me.

Mr. St. Clair: All right, the witness has been put on the Q.T. I press my question. I only asked him if he read it before he signed it. Isn't that a proper question?

Mr. Eisner: I have no objection. If that is the question, I withdraw my objection. I am not objecting to that [344] question.

The Court: Of course, if he is like I am with my insurance policies, I have never read one.

Mr. Eisner: I haven't either.

Mr. St. Clair: Yes, but you are not an expert, Your Honor, while he is.

Mr. Eisner: Oh, no, you are the only one that qualified as an expert.

The Court: It has been my experience, lawyers take out insurance policies, unless they are insurance experts, they never read them.

Mr. Eisner: I never read one.

The Court: I don't know whether insurance lawyers read the policy.

Mr. Eisner: In other words, this witness testified all his negotiations were in connection with the insurance as to rates of premium and the details are left to Mr. Davis.

(Testimony of James C. Coughlin.)

Mr. St. Clair: If that page 2 is a detail, I don't understand my English very well.

Q. Mr. Coughlin, do you recall reading that page before you signed the premium determination agreement?

A. Oh, no doubt I have, but again, on the other hand——

Q. What did you say, "Yes, you have read it"?

A. No doubt I have, yes.

The Court: What does that call for? [345]

Mr. St. Clair: I am just about to read it to Your Honor. Section 2 of Exhibit "S-something":

"The premium shall be subject to the following profit-sharing formula and all or part of the premium paid in excess of the earned premium shall be subject to adjustment and returned to the insured in accordance with the results obtained by the application of the following profit-sharing formula: Formula for determining earned premium. Charges:

"1. Incurred Losses and Loss Expense, plus

"2. Thirteen percent (13%) of the premium paid for Home Office Overhead Expense and contribution policy-holders' surplus, plus

"3. Taxes paid by the Exchange, plus

"4. The deficit, if any, from previous accounting period or periods.

"5. Commissions Paid."

Mr. Eisner: Is that all you are reading?

Mr. St. Clair: That is all.

Mr. Eisner: Inasmuch as counsel has read a part of that Exhibit, and it is our part of one Exhibit, I

(Testimony of James C. Coughlin.)

would like to read the last sentence of Exhibit "SS-4," which refers to the premium: "The maximum liability of the subscribers shall not exceed an additional amount equal to the premium deposit provided for the insurance obtained." Now, then——

Mr. St. Clair: No occasion for this. We can argue [346] that in our brief.

Mr. Eisner: You are reading a part of the Exhibit and I am reading another part. I am not arguing it.

The Court: I would like to ask Mr. St. Clair if he knows just what that language meant in layman's terms, that language in that agreement that you just read? In other words, what is the arithmetic of it?

Mr. St. Clair: The arithmetic is, you take your losses, Your Honor, the actual losses paid out, plus 13% for overhead.

The Court: You mean losses of a particular subscriber?

Mr. St. Clair: Yes. Each is a separate accounting problem. You take your losses plus your 13% and plus the taxes and probably—it, in fact, is only 5 and 10%, any re-insurance above that, so that means that the member of an Exchange is so insured to 5 and 10, Five Thousand and Ten Thousand, plus 13%, and, I understand, plus taxes and so forth. That is actually what that means, and if he has a catastrophe—one catastrophe, he doesn't get hurt too much, because he only pays on 5 and 10, but if he has a series of accidents that are around 5 and 10, he has to pay them. That is what it boils down to.

(Testimony of James C. Coughlin.)

The Court: What does that boil down to, a percentage premium?

Mr. St. Clair: Because it is 5 and 10, you mean, only? [347]

The Court: Well, here you have a percentage of premium he says he was paying, or was to pay, 1.223, I think, and the other side claims it is 2.20. How does this boil down into figures? Just estimate it.

Mr. St. Clair: There is no answer to that until we see their loss experience, because he has promised to pay the first 5 and 10 of the losses during the year himself, plus 13%, without any maximum or minimum, while the F. & C. offer him a minimum of one percent and maximum three percent, whereas under the re-insurance Exchange, where he is a member of the Exchange, there is no limit.

The Court: Maybe Mr. Coughlin is learning something he never knew before.

Mr. St. Clair: Maybe he is.

Mr. Eisner: I would like to state what I understand these documents to mean. Of course, I may not have the weight you have, from your experience. This contemplates a continuation of the insurance with this Exchange from year to year. At the expiration of each year a calculation is made of the earned premium and the premium paid, the earned premium being calculated as stated by Mr. St. Clair; then if the earned premium should be less than the premium paid, a dividend is paid to the subscribed or to the insured. In the event that the earned premium should be more than the premium paid, than the ex-



(Testimony of James C. Coughlin.)

cess is carried as a matter of record, [348] that is, these same figures that Mr. St. Clair has given, so that there will be no dividend paid to the insured in subsequent years until that deficit is made up or covered by the earned—by the premium that has been paid. But in the event that the insured should cancel the insurance, then if there should be a deficit remaining, the insured is liable for that deficit, but he is not liable for any deficit in excess, as stated in the policy itself, which is a part of the transaction, of the maximum liability, but is limited to the deposit premium made not only under the policy—which in the case of one policy, the primary policy here, was \$2500.00, and in the case of the other \$500.00, meaning \$3,000.00—but the maximum of liability in addition to the premium called for by the policy itself. Now, that is the way, from my readings and study of these Exhibits, I interpret them and understand them, what I understand them to mean.

Mr. St. Clair: Apparently, this is all opinion, but in any event, I have made the point it isn't a fixed premium he got from the Transport Exchange. It was a variable premium. That is all I was after any way.

Q. Did you hear some testimony one of these insurance company's witnesses about one loss while the policy was in existence of \$71,000.00, or some large figure like that? Are you aware of that?

A. No, I didn't hear the figure. [349]

Mr. Murman: I think that was a question I put to Mr. Coughlin in connection with the claims that we received.

(Testimony of James C. Coughlin.)

The Court: That was the Peralta case.

Mr. St. Clair: Yes, Your Honor. I was only interested from Mr. Coughlin how he got this \$81,000.00 a year that he has testified Mr. Coughlin told him he might have to pay under a F. & C. policy.

Q. You have no further recollection on that point, Mr. Coughlin, as to how Mr. Cantlen could arrive at \$81,000.00? A. No.

The Court: Wasn't that where Mr. Cantlen and somebody from the insurance company called the claims agent in and he thought he would win that case for \$1,000.00?

Mr. Murman: Yes. It was originally reserved at \$15,000.00, then they cut the reserve down to \$1,000.00, and the jury out-guessed them.

Mr. St. Clair: Also, Mr. Cantlen was so zealous on account of his principal that he cut it down to \$1,000.00 from \$15,000.00, Your Honor. That is all I have of this witness at this time.

Mr. Murman: No further questions.

Mr. Eisner: No further questions.

(Witness excused.)

WILLIAM J. DAVIS

called for the defendants: sworn. [350]

The Clerk: State your name to the Court, please.

The Witness: William J. Davis.

Direct Examination

By Mr. Eisner:

Q. What is your business, Mr. Davis?

(Testimony of William J. Davis.)

A. I am the General Auditor and Assistant Secretary of the California Motor Transport, Limited, and its affiliated companies.

Q. How long have you occupied that position?

A. Since the fall of 1937.

Q. Generally speaking, what are your duties, Mr. Davis, as such Auditor and General Superintendent?

A. Well, I am in charge of all internal auditing of the several corporations, auditing personnel, all books and records and legal documents, and fit in in a general way to other departments, as well.

Q. By the way, Mr. Davis, does the California Motor Transport Company have terminals and offices at various parts of the State of California?

A. Yes.

Q. How many terminals do they have?

A. Oh, we maintain company-owned terminals at Los Angeles, Bakersfield, Fresno, San Luis Obispo, Salinas, San Jose, Oakland and, of course, San Francisco, and other agencies at various other points and places in the State of California.

Q. Approximately how many employees does the California [351] Motor Transport Company have?

A. The several affiliated companies between, oh, five and six hundred.

Q. Now, Mr. Davis, you are acquainted with Mr. Cantlen?

A. Yes, I have been for a good many years.

Q. You were present at a conversation at which Mr. Coughlin and Mr. Cantlen were present also, in the month of July, 1946, in which conversation it per-

(Testimony of William J. Davis.)

tained to a possible renewal of the liability policy that was then held by California Motor Transport Company by Fidelity & Casualty Company?

A. Yes, I was present at that meeting. I don't recall the dates, whether it was in July or the latter part of July or the first part of August, but I was present at the discussion involving the subject of our renewal of our public liability and private liability insurance, in Mr. Coughlin's office, in which Mr. Cantlen was present.

Q. And that office was in San Francisco?

A. Yes.

Q. Now, Mr. Davis, will you state, as nearly as you recall, the substance of that conversation, what was said by the parties present?

A. To the best of my recollection, Mr. Cantlen and Mr. Coughlin started off their conversation before I was present. I think I was called in after they had been engaged in [352] conversation for some time, I don't know how long, but I recall that Mr. Cantlen was discussing our experiences and he was inclined to believe that F. & C. would want an increase in rates. I recall very distinctly bringing up a matter that Mr. Coughlin didn't think of at the time, and that was that we had just received a substantial rate increase in our transportation rates, that is, and that would automatically be passed along in premiums to the insurance company through the increase of our gross receipts. The increase was enjoyed by us in July of 1946 and we were also elated

(Testimony of William J. Davis.)

at getting it on account of all during the war years, we were at a very depressed rate.

Mr. Eisner: Just a moment——

A. That is why I recall specifically telling Mr. Cantlen about that rate increase, because the experience record that he presented didn't bring it up to that current date. The increase, as I recall, was 19%, less a 5 or 6% emergency increase that we had received about 30 or 60 days beforehand. I also called Mr. Cantlen's attention to the fact that we had an application pending before the Public Utilities Commission, which I think at that time was known as the California Railroad Commission, that we applied for an increase, that, if granted, would automatically be passed on in earned premiums to the F. & C.

I also cited the fact that we had purchased [353] substantially in new equipment; that a good deal of our personnel that were called into duty during the war had returned, and I think that this was very forcibly brought out by reduction in the re-occurrence of accidents.

All these things were brought out to support our contention that re-insurance should not be at any higher rate and should be continued in effect at the rate, the present rate, and Mr. Coughlin very specifically told Mr. Cantlen he definitely would not go along on any rate increase at that time. That was the substance of the conversation as I recall it.

Q. Now, Mr. Davis—can I have Exhibit “I”—I show you Defendants' Exhibit “I,” which is the letter from Mr. Cantlen, which accompanied the binder



(Testimony of William J. Davis.)

when it was delivered to Mr. Coughlin, and I will ask you if you retained that letter and the binder in your possession?      A. Yes, I did.

Q. Was this letter and the binder, the original of that letter and the binder, turned over to you by Mr. Coughlin?      A. Yes, it was.

Q. Did you observe, Mr. Davis, that this letter from Mr. Cantlen states, "This contract is your comprehensive public liability and automobile damage policy and the enclosed will act as evidence of insurance pending renewal"?

A. Yes, I did observe that. [354]

Q. Now, Mr. Davis, there is in evidence in this case reports of gross receipts and payments of premium, remittances, made by California Motor Transport Company to Bayly, Martin and Fay, after September 1st, 1946, covering the period after September 1st, 1946. Did you, personally, prepare those gross reports and attend to the remittances to Bayly, Martin and Fay?      A. Yes, I did.

Q. I am looking for those Exhibits, I think they are "J," "K," "L," "M," and "N." When you referred to the preparation of these reports and remittances, did you have reference to Defendants' Exhibits "J," "K," "L," "M" that I am now handing to you?

A. Yes. This is in my own handwriting, the handwriting data from which the stenographer prepares the checks. This is in my handwriting.

Q. In other words, to each of these Exhibits there is annexed a yellow sheet in your handwriting, which

(Testimony of William J. Davis.)

is the original sheet from which the checks were prepared?      A. That is correct.

Q. When I say checks, and also the voucher portion?

A. That is right. We refer to this as the memorandum voucher.

Q. The yellow sheet being the memorandum voucher?

A. From which the voucher and the check itself are typed. [355]

Q. Mr. Davis, now did anyone tell you to take the rate 1.223 in figuring the public liability which is shown upon the voucher portion of those checks?

A. Did anyone tell me to use that rate?

Q. Yes.

A. No, I don't know that anyone told me that.

Q. Why did you use that rate?

A. Because of the conversation between Mr. Coughlin and Mr. Cantlen in my presence, where it was understood that the rate in effect on the policy that was expiring on September 1st would be continued.

Q. You were present at a conversation where that was said?      A. I was.

Q. Where was that conversation held?

A. In Mr. Coughlin's office.

Q. Was the rate that is shown upon and that you have used in figuring these remittances the same rate that was in the policy that expired on September 1st, 1946?      A. Yes, that is correct.

Q. Now, Mr. Davis, after sending these remit-

(Testimony of William J. Davis.)

tances and several checks to Bayly, Martin & Fay, did you receive any protest or objection of any kind from Bayly, Martin & Fay?      A. No, sir.

Q. Did you receive any protest or objection from any person whomsoever, Fidelity & Casualty Company or Bayly, Martin & Fay? [356]

Mr. Murman: Objected to as immaterial, if the Court please.

The Court: I will allow it.

A. No, no one objected to the rate.

Q. (By Mr. Eisner): Now then, Mr. Davis, were you present at a conversation with Mr. Cantlen that occurred on or about October 22nd, 1947?

A. Yes, yes, I was.

Q. I am going to show you now Plaintiff's Exhibit '118,' did you write that letter?

A. Yes, I did.

Q. Now, Mr. Davis, will you state just the circumstances that existed and what occurred as between Mr. Cantlen and yourself when that letter was written or dictated.

The Court: Let me see the letter, first.

A. Yes, sir. Mr. Coughlin calls me into his office on the telephone——

The Court: Just a moment.

A. Oh, pardon me.

The Court: I remember the letter.

A. Mr. Coughlin called me on the phone and asked me to come into his office, and Mr. Cantlen was present, and Mr. Cantlen handed me a letter which was addressed to Bayly, Martin & Fay. It was a

(Testimony of William J. Davis.)

draft of a letter addressed to Bayly, Martin & Fay. And he asked me to have my stenographer prepare the letter [357] for my signature and give it to him. He said that I could phrase it as I wanted to, but the substance of the letter should be as indicated in his draft. Mr. Coughlin indicated it was all right for me to do so, so Mr. Cantlen and I went back to my office and I transcribed the letter on the Ediphone equipment and my secretary wrote the letter.

Q. Was Mr. Cantlen present when you transcribed the letter to your Ediphone equipment?

A. Yes, he was.

Q. Was the letter that you transcribed in substance the letter that Mr. Cantlen showed you a draft of and which he had in his possession?

A. That is correct.

Q. Now, Mr. Davis, I want to show you Plaintiff's Exhibit "12," which is the audit prepared by the Auditor of the Fidelity and Casualty Company. Now, Mr. Davis, I am showing you Plaintiff's Exhibit "12" and ask you——

The Court: That is a final audit, is it?

Mr. Eisner: That is the final audit.

Q. ——if you have seen that Exhibit or any part of it prior to the trial of this action?

A. I most definitely have seen page 2 of the Exhibit.

Q. Now, Mr. Davis, what is upon page 2?

A. The gross receipts of the several companies for the period September through January 21st of

(Testimony of William J. Davis.)

1946-47; the start of [358] September, 1946, until January 21st, 1947.

Q. Now then, under what circumstances did you see that page?

A. Well, the Auditor came down to determine the correctness of our report of gross receipts for this period, and, I will say, the payroll figures at the same time. Part of this policy was based on payrolls so he took certain payroll figures from our records.

Q. Did the Auditor have access to your books and records to take off the figures? A. Yes, he did.

Q. Then after having taken off the figures, did he submit them to you?

A. Yes, they always submit them to me.

Q. Was there any discrepancies between the gross receipts that have been reported by you as Auditor for California Motor Transport Company and its affiliates, and as shown by Defendants' Exhibits "J-2-N" and the gross receipts as ascertained by the Auditor of the Fidelity and Casualty Company and submitted to you at that time?

A. I wouldn't make any positive statement that there weren't minor errors or discrepancies. However, any time there are any discrepancies at any time between the gross receipts reported monthly and those developed by the Auditor they are called to your attention by the Auditors, and there was no such attention called to this particular audit, so [359] I am assuming that the gross receipts shown on page 2 of this Exhibit are identical with the gross receipts that we reported on our monthly basis.



(Testimony of William J. Davis.)

Q. In other words, at that time the Auditor did not call to your attention any discrepancies?

A. No.

Q. And, Mr. Davis, was anything called to your attention or submitted to your approval other than your certification of the gross receipts as shown upon the second page of that Exhibit?

A. No, nothing else.

Q. Mr. Davis, I call your attention to the following words written upon the page of the Exhibit which bears your signature, "Assured refused to sign retrospective agreements. Retrospective rates not to be used." Were those words upon that Exhibit when you signed your approval or certified to the correctness of the audited figures?

Mr. Murman: I object to that on the ground it is an attempt to vary a written instrument.

Mr. Eisner: It is no attempt to vary a written instrument.

Mr. Murman: Certainly is.

The Court: I will allow it. There is some evidence that some of that writing was not on there at the time it was signed. [360]

Mr. Murman: I remember testimony by Mr. Challburg that as to the entire Exhibit, there was writing that was not on the entire Exhibit at the time, but this is on the page that the witness himself signed.

The Court: Yes. I thought it was on that particular Exhibit.

Mr. Eisner: It was. Counsel's statement is not

(Testimony of William J. Davis.)

quite accurate, sir. I did—I said, “Mr. Challburg, with reference to that particular writing on that particular page,” whether or not that was on there.

The Court: Mr. Challburg also testified when it was signed by Mr. Davis the reference to policy—I believe Insurance Policy 12968 was at that particular page.

Mr. Murman: That is correct.

The Court: Mr. Challburg testified that was on there.

Mr. Murman: Yes.

Mr. Eisner: Your Honor remembers it absolutely?

A. Could I have that question again?

Mr. Murman: May I have a ruling on the objection?

A. Oh, I am sorry.

The Court: Overrule the objection, for the reason I have just stated.

Mr. Murman: Yes, Your Honor.

The Court: That came up on your direct case.

A. You asked me—— [361]

Q. (By Mr. Eisner): If the writing which appears on that page that bears your signature and which I have just read to you was upon that page, according to your best recollection, at the time that signature was appended?

A. I couldn't say. I couldn't say if it was there or not.

Q. You have no recollection? A. No.

Mr. Murman: That wasn't his testimony. He

(Testimony of William J. Davis.)

said he couldn't say. It isn't that he had no recollection, he said he couldn't say.

Mr. Eisner: I am asking him if he has any recollection.

The Court: I wrote down, "I can't say whether it is there or not."

Mr. Murman: That is exactly what he said.

The Court: That is what you said, isn't it?

A. That is what I said.

Q. (By Mr. Eisner): Now, Mr. Davis, there is in evidence in this case evidence that the California Motor Transport Company had had insurance policies from Fidelity and Casualty of a similar character to that that was in existence on or prior to September 1st, 1946, for a number of years. Did those prior policies call for a deposit premium, prepayment of deposit premium?

A. Yes, in all instances.

Q. In all instances? [362]                      A. Yes.

Q. In all prior instances, Mr. Davis?

The Court: There doesn't seem to be any debate or controversy about that.

Mr. Eisner: Very well then, I won't pursue it.

The Court: So far as I know, it has been testified to by everybody in the place.

Mr. Eisner: That the deposit premiums were regularly billed and collected?

The Court: That is right.

Mr. Eisner: All right, I won't pursue it any further.

The Court: Except on the last one.

(Testimony of William J. Davis.)

Mr. Eisner: Except on the last one.

Mr. Murman: That is correct.

Q. (By Mr. Eisner): In all prior instances, Mr. Davis, had the policies that they were issued by the Fidelity & Casualty Company been delivered to the California Motor Transport Company prior to the time or approximately the time the policies, that the prior policies, expired? A. That is correct.

Q. Now, I want to show you this Exhibit "PP," which has been shown to Mr. Coughlin here. Here it is.

The Court: That is the Manganese letter, written in July, 1946, I think.

Mr. St. Clair: November of 1946, Your Honor.

Q. (By Mr. Eisner): Now, Mr. Davis, did you handle this correspondence pertaining to this American Manganese Company? A. Yes, sir.

Q. Well, do requests frequently come from customers or shippers to receive corroboration of your insurance coverage?

A. Yes, I get any number of them over a period of a year.

Q. What is your practice with reference to them? What do you do with them?

A. I write a letter to the firm giving the inquiry relative to our insurance. I mean, I write a letter to our insurance broker transmitting the letter from the shipper or consignee and asking that they favor the firm with a letter direct, answering the inquiry, and letting me have a copy for my file so that I know that it was attended to.

(Testimony of William J. Davis.)

Q. When you get a copy of the letter for your file from Bayly, Martin and Fay, is it your practice to read that letter to see what Bayly, Martin and Fay has written to your customer?

Mr. Murman: I think that is immaterial, if the Court please.

A. No, sir. The letter I write to the broker——

Mr. Murman: As far as this party is concerned, it is immaterial.

The Court: It has been answered, but to me it is really immaterial because, after all, it is a question of [364] notice there. He gets a letter which he doesn't read, and it is his own fault.

Mr. St. Clair: That is why I didn't object to the question, Your Honor.

A. I would like to explain that, if you don't mind.

Mr. Eisner: Yes, explain your answer.

Mr. Murman: I object to the explanation.

Mr. St. Clair: He has answered what he did. It doesn't require an explanation.

A. I would like to explain, sir, all these matters are handled by my secretary and I signed a form letter. I mean, I ask the broker or insurance company to respond to the letter of the shipper or consignee and I ask for a copy of the letter.

The Court: What for?

A. To see that it is responded to. I am interested in seeing our shipper gets that information when they make an inquiry, otherwise they may not favor you with their business, but when the letter comes in from the broker, I never see it. The copy of my



(Testimony of William J. Davis.)

letter is held in the suspense file by my secretary to await a reply from the broker or insurance company and to hold in an inquiry file from there. I never even see the letter.

Q. (By Mr. Eisner): You never even see the letter?

A. No, sir, I am not interested in it. [365]

Q. I show you this letter, which is a part of Exhibit "PP," which purports to be a copy of a letter from Mr. Cantlen or Bayly, Martin & Fay to the American Manganese Steel Division and ask you when you first saw that letter and read it?

A. It was just a very few minutes ago when you gave it to me.

Q. In this court room?

A. We unquestionably have a copy of this in our files, but this is the first time I have seen the writing, to my knowledge.

Q. I am going to show you Plaintiff's Exhibit "19," Mr. Davis, which purports to be a letter, copy of a letter, written to California Motor Transport Company, by Bayly, Martin & Fay, under date of November 12, 1947. To the best of your knowledge, was the original of the letter ever received by the California Motor Transport Company?

The Court: What is the date of that?

Mr. Eisner: November 12th.

Mr. St. Clair: 1947?

Mr. Eisner: Yes, that is what I said.

A. No, to the best of my recollection I have never seen the original of that letter.

(Testimony of William J. Davis.)

The Court: Do I understand you to say the original of that letter was never sent by you, or, to answer Mr. Eisner's [366] question, that is was never delivered to the California Motor, the Defendant in this case?

A. Well, normally letters of that nature would come into my office, and I don't recall ever having seen the letter.

Mr. Eisner: Mr. Coughlin testified to the same effect, if the Court please.

Q. (By Mr. Eisner): Have you ever seen such a letter in the files of the California Transport Motor Company? A. No, sir.

Q. Mr. Davis, claims were submitted by California Motor Transport Company to the Fidelity & Casualty Company on losses that occurred between September 1st, 1946, and January 21st, 1947?

A. Yes, they were.

Q. Were those claims submitted in the same form as claims had previously been submitted under the prior existing policy? A. Yes, identical.

Q. Upon any of the claims that were presented and submitted, was there any number of any policy? Well, they speak for themselves, I will withdraw the question.

The Court: I was going to suggest the claims would speak for themselves.

Mr. Eisner: Yes.

Q. The policies, Mr. Davis, are ordinarily kept in your possession, the insurance policies, under your control? [367]

A. Yes, our policies are kept under my control.

(Testimony of William J. Davis.)

Q. When was the—was October 22nd, 1947, the first time that policies under numbers 20961 and 20930 were called to your attention?

A. Yes, the same day that Mr. Cantlen came into our place of business with the draft of the letter. If that was October 22nd, that is the first day I ever saw the policies.

Mr. Eisner: I think that is all.

The Court: I want to tell you, gentlemen, we are going to stop here sharply at 4:00 o'clock for two reasons: I have an appointment downtown at 4:15 and for another reason, I have been on this bench since 9 o'clock this morning.

### Cross-Examination

By Mr. Murman:

Q. Mr. Davis, with this organization that you mentioned, you knew, did you not, you had to have filings with the Railroad Commission and the I.C.C. to carry on business? A. Yes, I do.

Q. When this binder was given you along with the letter from Mr. Cantlen stating that this insurance, that this kept your insurance in force, or words to that effect, did you check with the I.C.C. or Railroad Commission as to whether or not they have the filings on this binder?

A. No, I didn't personally check with them. The regulatory business, that is something that was always taken care of [368] by Mr. Cantlen.

Q. You relied on Mr. Cantlen to take care of that? A. That is correct.

(Testimony of William J. Davis.)

Q. So that when you got this binder, you didn't see fit to find out what kind of filing, if any, were made with the Railroad Commission and Public Utilities—I.C.C.?

A. No, I didn't.

Q. That was part of your duty if you had done it yourself, but you relied on Mr. Cantlen, is that right?

A. The brokers have always handled filings with the regulatory bureaus for us.

Q. When Mr. Cantlen, at the meeting in July, referred to the F. & C. desiring an increase of rates, is that the first time you had heard that the F. & C. were interested in increasing the rates that had been in existence for five years?

A. I don't know that Mr. Cantlen made the statement that they were interested, insisting on increase of rates. As I recall the conversation, he had our experience record and said that they might want an increase in rates.

Q. Was that the first time he brought to your attention the fact that they might want an increase in rates?

A. To my recollection, yes.

Q. Never on any previous discussion concerning renewals?

A. No. No.

Q. Coming back to this Exhibit "10," Plaintiff's Exhibit "10," [369] which was the final audit, you recall—

A. I recall the Exhibit.

Q. Mr. Eisner read you some language and you said you didn't recall whether it was on there at all at the time you signed. He didn't read this, and I will ask you whether this language was on there at the time you signed: "Rates of 150-BI, 50-PD, rates

(Testimony of William J. Davis.)

of 15-BI, 05-PD, (given to me by underwriting department):" Was that on there at the time you signed it?      A. I couldn't say if it was or not.

Q. To the best of your recollection?

A. I just couldn't say. The only thing I would be interested in there was any difference in gross receipts.

Q. There is quite a space, Mr. Davis, from the top of the page where these audits as to gross receipts end, and the bottom where you signed. Don't you have any recollection as to whether there was writing in between there?

A. No, I don't know. Three years is a long time ago.

Q. Did you note at the bottom here whether "California Motor Transport Company" was written opposite "insured"?

A. No, I can't say that I noted that.

Q. How about policy numbers SPL-20950? Did you know whether that was on there?

A. No, I didn't. I don't recollect what was on there. I know when they come in it is a matter of determination of proper report and gross receipts during the period, and the [370] policy number wouldn't mean anything, or anything else. If there are any discrepancies in the amount between our report and the amount of final audit, the Auditor would call it to my attention. We have any number of them.

Q. However, your signature is opposite the word "Certified by——."      A. William J. Davis.



(Testimony of William J. Davis.)

Q. And your recollection is that, in signing that, all you recall is these figures that are at the top of the page, is that right? A. That is right.

Q. Was Mr. Challburg's signature on there as yet?

A. I couldn't tell you whether he preceded mine or not.

Q. This ordinarily consists of more than one sheet, wouldn't it not? A. I believe so.

Q. Here is a second sheet under the one that bears the signature, upon the same type of paper, and carries the same general printing throughout. Do you recall whether or not you looked at that before you signed the page that preceded it?

A. I don't know whether I did or not.

Q. That has to do with the payroll, does it not?

A. That is correct.

Q. That audit as to payroll was made to determine the correctness [371] as to the payroll figures, was it not?

A. Yes. It is entirely different, I might add, to the payroll of our—entirely different from your gross receipts.

Q. I understand, but nevertheless, the audit of the payroll figure was part of the final audit, was it not? A. Yes, unquestionably.

Q. When you certified as to the other side by signing your name to the preceding page, did you certify to the correctness of these payroll figures as well?

(Testimony of William J. Davis.)

A. I don't know that that second sheet was ever given to me.

Q. Can't you tell us whether you certified to the payroll figures as well as the gross receipts?

A. No, I can't. There is no signature on it. I don't know that that document was given me at the same time this was.

Q. But you would agree to it that the final audit consists of certification both as to gross receipts and payroll?

A. Not certification, no. I said the audit consists of payroll figures, as well as gross receipts, not to certification. There is no certification on this.

Q. Then it is your statement that you can't tell us whether or not you certified to these payroll figures or not?      A. No, sir, I couldn't.

Q. As to the other writing appearing herein, "Swampers and Dockmen," right down to the bottom of the page, you can't tell us now whether you saw that statement in that form? [372]

A. No, I am assuming I did, but I can't say definitely I did.

Q. Why do you assume you did?

A. Because the figures would be taken from records in our office, and presumably on the same date, so I would assume I saw these figures at the same time.

Q. Isn't it a fact your signature appearing here as it does is some evidence upon which that assumption is based?      A. I would say, yes.

Q. As a matter of fact, in previously signing

(Testimony of William J. Davis.)

audits, you certified to both payroll and gross receipts, didn't you, on previous contracts all this 5-year period?

A. I would say so, if payrolls were insured.

Q. On this matter of claims now—well, before I get to that, while Mr. Schaeffer is getting out the correspondence, do you recall on October 22nd, 1947, when you signed the letter which you said Mr. Cantlen had prepared and you had typed—do you recall that?

A. Yes, I do.

Q. When you signed that letter, Mr. Davis, that was the representation or attitude of your company as to the payment of the additional premiums which the F. & C. is now claiming, isn't that correct? Isn't that the attitude of the company as appeared in that letter?

A. Oh, yes, most definitely. [373]

Q. And you ended up by saying, "At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223. It is, therefore, necessary for us to decline payment of your invoices submitted in view of the aforementioned reason." Is that correct?

A. That is correct. That is the attitude.

Q. That was your attitude? Skipping to Plaintiff's Exhibit "19," which you furnished—which was furnished by F. & C. as a copy sent to them by Mr. Mettalia, and going on to the claims themselves, do do you recall sending a claim to the F. & C. that involved an accident which occurred on November 19, 1946, but about which no law suit was filed until December, 1947, or until November, 1947?

(Testimony of William J. Davis.)

A. Did you say did I recall the accident?

Q. Or do you recall any accident involving a driver by the name of Murphy?

A. Oh, yes, yes, I remember that. I was a witness, I believe.

Q. That matter came to your attention in November, 1947, did it not, as far as the law suit was concerned?

A. Is there anything there to indicate that? I don't know that is the date.

Q. Well, there is a notation by the F. & C. showing the date of accident, November 19, 1946, and reported to the company on December 4, 1947, over a year afterwards.

A. Well, as I say, I don't recall. I was probably served [374] the papers in this matter. I do recall the case very well. We were, as the case developed, we were improperly made a party to that suit and it wound up by us being declared non-suit against the company.

Q. Well, when you got the papers, you referred them to the F. & C. for defense, did you not?

A. That is correct.

Q. And the F. & C. defended you, did they not?

A. Yes, that is correct.

Q. Through their lawyers? A. Yes.

Q. In the course of that reference, did you receive a letter from Mr. Tapscott of the Claims Department of F. & C., stating that F. & C. would defend that case, on reservation of their rights as to

(Testimony of William J. Davis.)

your delay in notice, but otherwise would take the Defense?

A. I may have received such a letter. I don't recall it.

Q. This reference to the F. & C. of the defense of this case took place after you had written a letter to Bayly, Martin & Fay as set forth in Plaintiff's Exhibit "18," did it not, which letter is dated October 22nd, 1947?

A. You say that this letter was written——

Q. That the reference came after this letter, Plaintiff's Exhibit "18."

Mr. Eisner: The documents speak for themselves, counsel. [375]

Mr. Murman: There is no dispute about them?

Mr. Eisner: No, one is April 21st, 1946, and the other October 22nd, 1947. A. Yes.

Q. (By Mr. Murman): The reference came afterwards? A. Yes.

Q. I show you a letter addressed to California Motor Transport Company, Limited, dated April 21st, 1947, the original of which was signed by R. M. Tapscott, Claims Attorney, purporting to be a copy of that letter, and ask you whether or not you received the original?

A. I don't recall. I have seen this letter. It is directed to our Mr. J. H. Cross. I don't recall seeing this letter before it was directed to the attention of our Mr. Cross.

Mr. Murman: Is there any dispute about that, Mr. Eisner?



(Testimony of William J. Davis.)

Mr. Eisner: I have no objection to assuming it was.

Mr. Murman: Then, may I offer it in evidence as Plaintiff Exhibit next in order, which I believe is No. 20?

(Document was marked Plaintiff's Exhibit "20" in evidence.)

The Court: I hate to break into this, Mr. Murman, but I have to leave now. What can we do about this?

Mr. Murman: I was going to read this, then that would terminate my cross-examination. [376]

The Court: Read it, then.

Mr. Murman: (Reading Plaintiff's Exhibit "20."):

Q. That is the case that the attorneys got a non-suit on, is that correct? A. That is correct.

Mr. Murman: No further questions.

The Court: I have to go to trial tomorrow and have a jury called. How long will it take you to finish this case?

Mr. Eisner: This is the last witness I have.

Mr. St. Clair: This is the end, so far as I know, Your Honor.

The Court: Have you any further examination?

Mr. St. Clair: Only to ask what that gross receipt was that Mr. Coughlin couldn't answer, and which I said was One Million One Hundred Thousand, is that it?

A. Roughly the figure would be annual.

Mr. St. Clair: That is all.

Mr. Murman: Then the case can be submitted.

The Court: Then let's mark it submitted, and I would like to have you gentlemen brief it for me. Those Exhibits, I can remember each pretty well, but I can't remember all the matter in them. Suppose you brief it and if I want to have you argue something, I will ask you.

Mr. St. Clair: We are Third Party Defendants. Our interest is very narrow. I think Mr. Murman should make the [377] first brief, then Mr. Eisner, then myself.

The Court: Yes.

Mr. Murman: I should have an opportunity to answer Mr. Eisner's brief.

The Court: Suppose you file the first brief, Mr. Murman, then Mr. Eisner can answer and Mr. Eisner in his brief can set up his claim against Mr. St. Clair and both of you can answer Mr. St. Clair's brief.

Mr. Murman: I would like to have thirty and thirty. We have to have the record written up so that we can properly refer to it.

Mr. Eisner: There is just one question that I overlooked, just one question of Mr. Davis, if the Court please: Mr. Davis, were you present at the conversation where Mr. Simpson of the Insurance Exchange Company was present with Mr. Coughlin?

Mr. Murman: Objected to.

Q. The latter part of July or in July of 1946?

Mr. Murman: Objected to as not proper redirect examination.

Mr. St. Clair: Yes, I don't think that is proper.

He has had this witness on the stand all afternoon.

The Court: I don't care about that, but he stated all Simpson said was that he could get the same rate at \$1.22, and it is hearsay, in the second place, as far as these people are concerned. [378]

Mr. Eisner: That they could get the same policy at the same rate.

The Court: Assume that is what he testified to——

Mr. Eisner: Yes, very well.

Mr. St. Clair: What is the time for filing briefs?

The Court: Let's make it ten and——

Mr. St. Clair: How about twenty, Your Honor?

Mr. Eisner: I would like more time, Your Honor.

The Court: All right, make it twenty, twenty and twenty. We will adjourn until 10:00 o'clock tomorrow morning.

### Certificate of Reporter

I, Kenneth J. Peck, Official Reporter, certify that the foregoing 379 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed December 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint

Order Granting Motion to Bring in Third Party Defendant

Third Party Complaint

Answer

Answer of Third Party Defendant

Memorandum Opinion

Findings of Fact and Conclusions of Law

Judgment

Notice of Appeal to Court of Appeals for the Ninth Circuit

Appellants Designation of Record, Proceedings and Evidence to be Contained in the Record on Appeal

Reporter's Transcript—Vol. 1—for September 30, 1949

Reporter's Transcript—Vol. 2—for October 10, 11, 17, 1949

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 and 20

Defendants' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M and N

AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS-1, SS-2, SS-3 and SS-4

Envelope of miscellaneous papers.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of October, A.D., 1950.

C. W. CALBREATH,  
Clerk,

[Seal]: By M. E. VAN BUREN,  
Deputy Clerk.

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[Endorsed]: No. 12722. United States Court of Appeals for the Ninth Circuit. California Motor Transport Co., Ltd., a Corporation, et al., Appellants vs. The Fidelity and Casualty Company of New York, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 26, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.



In the United States Court of Appeals for the  
Ninth Circuit

No. 12722

CALIFORNIA MOTOR TRANSPORT CO., et al.,  
Appellants,

vs.

The Fidelity and Casualty Company of New York  
and Bayly, Martin & Fay, Inc., a Corporation,  
Respondents.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY

The points upon which appellants, and each of them, intend to rely upon the appeal of the above-entitled action are as follows:

1. The insufficiency of the evidence to support the findings of fact upon which judgment in favor of respondent, The Fidelity and Casualty Company of New York, was predicated.
2. The insufficiency of the evidence to support the findings of fact upon which judgment in favor of respondent, Bayly, Martin & Fay, Inc., was predicated.
3. The decision is not supported by the evidence.
4. The decision is against the law.
5. The insufficiency of the evidence to support a finding that Policy SPL 20950 or Policy SPL 20968

was ever accepted, or that either of said policies ever became effective.

6. The insufficiency of the evidence to support a finding that Policy SPL 20950 or Policy SPL 20968 was ever issued or offered upon any premium basis other than a retrospective rating basis.

7. The failure of the Trial Court to find that Policy SPL 20950 and Policy SPL 20968 were offered only in conjunction with a retrospective rating plan, which said plan was never accepted.

8. The insufficiency of the evidence to support a finding that appellants reported claims and losses under Policy SPL 20950 or Policy SPL 20968, and that appellants remitted monthly premium payments under said policies.

9. The failure of the Trial Court to find that the insurance in effect during the period in dispute was a certain binder made and executed by respondent, The Fidelity and Casualty Company of New York, which said binder was in effect during the entire period covered by this action.

10. The insufficiency of the evidence to establish that respondent, Bayly, Martin & Fay, Inc., accepted the policies sued upon, or either of them.

11. The insufficiency of the evidence to support a finding that respondent, Bayly, Martin & Fay, Inc., did not represent to appellants that the binder issued by respondent, The Fidelity and Casualty Company of New York, provided appellants with insurance during the negotiations between the parties.

12. The insufficiency of the evidence to support a finding that either Policy SPL 20950 or Policy SPL 20968 was accepted by respondent, Bayly, Martin & Fay, Inc., with the knowledge and in accordance with the instructions of appellants.

13. The insufficiency of the evidence to support a finding that respondent, Bayly, Martin & Fay, Inc., did not conceal the receipt of Policies SPL 20950 and SPL 20968, and that said respondent did not fail to notify appellants thereof.

14. The failure of the Trial Court to find that respondent, Bayly, Martin & Fay, Inc., negligently omitted to notify appellants, and each of them, of the receipt of Policies SPL 20950 and SPL 20968 from respondent, The Fidelity and Casualty Company of New York.

15. The failure of the Trial Court to find that respondent, Bayly, Martin & Fay, Inc., negligently omitted and failed to deliver said policies to appellants, and each of them.

16. The failure of the trial Court to find that if the policies of insurance sued upon were accepted, they were accepted by respondent, Bayly, Martin & Fay, Inc., contrary to and in violation of its authority.

Dated: October 31st, 1950.

/s/NORMAN A. EISNER,  
Attorney for Appellants.

Affidavits of Service by Mail attached.

[Endorsed]: Filed November 1, 1950.

